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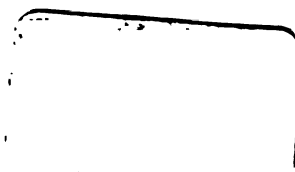
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LAW

BY

WILLIAM T. HUGHES

AUTHOR OF "CONTRACTS," "PROCEDURE" AND "DATUM POSTS OF JURISPRUDENCE"

The datum posts of the law are its maxims and illustrative cases,
which are the prescriptive constitution.

Melius est petere fontes quam sectari rivulos.

Regula pro lege si deficit lex.

"The Roman still holds dominion over this world by the
silent empire of his law."

VOLUME IV

CHICAGO

PUBLISHED BY THE USONA BOOK Co.

1908

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DEC 12 1910

Press of the BROWN-COOPER TYPESETTING Co., Chicago, ILL.

FOREWORD

Volume I of this series embodies the fundamental principles of the law—its grounds and rudiments—presented in sections numbered from 1 to 313. The remaining three volumes comprise the Text-Index, alphabetically arranged: Volume II, from A to the LEADING CASES; Volume III is the LEADING CASES, also published separately under the title DATUM POSTS; this Volume IV presents the remainder of the Text-Index, from the LEADING CASES to Z, inclusive. The content of this Volume IV is an orderly continuation of the plan of presenting maxims, cases and topic heads as begun in Volume II.

It is a continuation of the array of matter chiefly selected from the Roman, Norman, English, Federal and best state matter, from which the student can pick the true history of the law, also the means of giving him new habits and modes of thought. From Volume II, he can find *Hadley* (p. 529) or *Ignorantia legis* (p. 547). From Volume III he can also find clusters of great cases, set in thesis and antithesis; these clusters are led to by apt citation upon the plan adopted in all parts of the work. To illustrate: A reference to *Lampleigh* (Leading Case): 301, will lead to that in Volume III, and following cases. The value of what the reader will find there can be readily judged. This brief plan of citation is sufficient to lead to gatherings of cases upon various subjects.

Throughout the plan is to lead to the maxim or the case on the subject one is considering. To illustrate: If a discussion of FIXTURES is desired, that topic will be found in its place in Volume II; therefrom *Elwes v. Mawe*, the case, also *Quicquid plantatur* (Vol. IV), the maxim, are given. This will illustrate one of the singular features of the work.

The matter relating to the six leading subjects, namely, *Procedure* (Evidence, Pleading and Practice), *Equity*, *Contract*, *Crime*, *Tort* and *Construction* has been constantly kept in view; also, that at the base of these leading subjects is the prescriptive or unwritten constitution, which is that matter of the Roman, Norman and English already referred to. If the leading subjects arise from the prescriptive constitution in England and other European countries, then necessarily they likewise depend upon that base and support in America. Necessarily the landmarks of protection are adopted from the English exactly as those subjects are adopted. In neither country can the necessary elements of the leading subjects be denied, much less reversed or abandoned. A reversal of the rule, *Caveat emptor*, would affect the law exactly the same in both countries. Accordingly the view is continued that the maxims are the "ancient landmarks" which cannot be removed without emasculating the subjects they support. And these maxims light and lead the way. 210 U. S. 246.

Erroneous and mischievous definitions of pleading are generally found. All of these definitions which countenance the view that new and variant theories have come are not consistent with the views offered in this work. This will appear from a consideration of the topics, THEORY OF THE CASE, VARIANCE and WAIVER. The view herein offered is that *procedure and all its parts are from antiquity*. To support these views are cases like *Campbell v. Porter*: 2 (Vol. III), *Mallinckrodt*: 12a (Vol. III) also in Vol. IV; this latter case will also be found mentioned in this volume at p. 875, also in relation to the THEORY OF THE CASE. It is viewed as a very instructive case.

PRESCRIPTIVE CONSTITUTION. There is a constant effort throughout this work to impress the fundamentals of the law—its grounds and rudiments, and that upon these all laws depend. The importance of the prescriptive constitution may be judged from its influence in the law of construction. See chapters III and V, Vol. I. By reference to the index of that volume many illustrations will be found of the operation and influence of the unwritten constitution. See also *Church*, CODES, CONSTRUCTION, *In jure*, Vol. II; Dimes: 176, Oakley: 222, Indianapolis R. R.: 223, Vol. III; also *Lex*

non exakte; MANDATORY RECORD; PRESCRIPTIVE CONSTITUTION; PROCEDURE; THEORY; VARIANCE, Vol. IV.

In connection with these topics other maxims and cases will be found. From these the question of the existence of the imperial law may be judged. Every jurisprudent should have definite views as to the higher law; this fact was fully appreciated in elaborating this work. Reference to the following topics will afford various and instructive viewpoints: *Lex non exakte*; LITERATURE; MANDATORY RECORD; MAXIMS; *Melius est petere fontes quam sectari rivulos*; *Interest reipublicæ ut sit finis litium* (see RES ADJUDICATA; MERITS); *Necessitas* (Rodgers v. R. R.); NECESSITY; *Nemo debet bis vexari*; *Nemo debet esse iudex in propria sua causa* (S. ex rel. Henson v. Sheppard); *Nemo tenetur seipsum accusare*; *Non hæc in fœdera veni* (Smout); *Nova constitutio*; *Nuda pactio*; *Nulla pactione*; *Nulla vendemus*; *Nullum tempus occurrit regi*; *Nullus commodum capere potest de injuria sua propria* (Riggs v. Palmer); *Nunquam res humanæ*; *Pacta conventa*; Pearsall v. Smith (effect of fraud upon a statute; *Ex dolo malo*); P. v. Town of Salem; *Posito uno oppositorum* (1 page, outline citation); *Privata pactionibus*; PROCEDURE; Quinn v. P. (2 cases); *Quod ab initio*; REASON; RECORD (2 pages); *Regula pro lege, si deficit lex*; RES ADJUDICATA; R. v. — (cases); *Salus populi suprema lex*; S. ex rel. Henson v. Sheppard; Stockdale (Parliament is omnipotent); Taylor v. Sprinkle (Ill.); Thomas v. Citizens' R. R. (Ill.). See also matters referred to in Foreword to Vol. II; also Preface, DATUM POSTS; maxims and cases, RES ADJUDICATA.

PROCEDURE. The matter of this subject is elaborated from the conserving principles of procedure. §§ 83-123, 171-261, Vol. I; also §§ 269-279, Vol. I. Important maxims, cases and topics are discussed in these sections. These maxims, cases and topics are alphabetically presented in the Text-Index, Vols. II, III and IV, of this work. Throughout the elaboration it is impressed that the study of procedure is from the prescriptive constitution, also that the study of procedure is the study of government. These advanced and individualistic views of the author have engaged his earnest solicitude, and awakened watchfulness for important decisions relating to this most important branch of the law, and also its most unsettled. This may be indicated by what will be observed of *Fauntleroy v. Lum*, 210 U. S. 230, also *Londoner v. Denver*, id. 373 (*Audi alteram partem*). See also Preface, DATUM POSTS, in relation to principles involved in these cases.

The matter of Procedure is the most important of the law. It has been the effort to gather and state the fundamental principles of Procedure so that they can be found and learned. For these ends the maxim, the case and the topic have been employed, as will appear from a consideration of the sections already referred to. See also CERTAINTY; CODES; CONSERVING PRINCIPLES; MANDATORY RECORD; PLEADING; PROCEDURE; RECORD; RES ADJUDICATA; RULES OF COURT; THEORY OF THE CASE; VARIANCE; *Verba fortius*; WAIVER, and topics referred to therefrom.

Nothing is more important than the right comprehension of the Mandatory and the Statutory Records, and the fundamental rule of evidence and of all governmental operations, namely, "What ought to be of record must be proved by record and by the right record." *Campbell v. Porter*: 2: cases, Vol. III; PROCEDURE, Vol. IV. The maxims, cases and topics of procedure should be referred to by the practitioner as well as by the student.

In this volume prominence is given to the following: *Lex non exakte*; LITERATURE; LIMITATION OF ACTIONS; Lonstorf (codes, how construed); Malinckrodt (see also THEORY, also L.C.12a, Vol. III); MANDATORY RECORD; *Master v. Miller* (alterations); MATERIALITY (of allegation and of issue sought) McAfee (if facts are admitted, court may enter judgment); McDermott (exceptions must be specific); MERITS (merits are sought; see CONSERVING PRINCIPLES—the 13th—§ 103, Vol. I).

Milligan's Case (territorial jurisdiction); NECESSITY (important rules founded upon necessity); NEGATIVE ALLEGATIONS; NEGATIVE PREGNANT PLEADING; NEGATIVE PROOFS; NOTICE; *Nunquam res humanæ* (jurisdiction cannot be gained of forbidden matters. *In pari*; see *Fauntleroy*, *supra*; *Quod ab initio*; SUBJECT-MATTER; RECORD); Osborn (cause of action must exist at commence-

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ment of suit); Paralso (due process of law); PARTIES (2 pages); Pettibone (fraud condoned. See also *Fauntleroy*, *supra*); *Placitum* (its uses); PLEADING (jurisdiction depends on a cause of action. *Smoot's Case*; *Smith v. Burrus*; *Slacum*; *Osborn v. Moncure*. Also a claimant must be free of fraud. See *Nunquam res humanæ*).

POLICE POWER (limitations of legislative power; RULES OF COURT; SUBJECT-MATTER; *Scott v. McNeal*); *Posito positorum* (allegations, denials, issue, ought to be true and *bona fide*. See *SHAM*; *TRUE*); PROCEDURE (11 pages; outline citation; the conserving principles are the basis—the grounds and rudiments of procedure); *Quod ab initio*, etc. (very important rules stated; exceptions save themselves, when. See *Mallinckrodt*, *supra*; PROCEDURE; THEORY; WAIVER); REPLICATION (code principles and requirements. See also *Sache*; PROCEDURE); REPUGNANCY (*Posito*; *Allegans contraria*; *Nihil possumus contra veritatem*); RES ADJUDICATA; Supply Ditch); RES ADJUDICATA (11 pages; the third conserving principle, § 91, Vol. I. See also §§ 171-201, Vol. I; DUE PROCESS OF LAW; JURISDICTION; maxims, cases and rules of PROCEDURE); RULES OF COURT (certainty essential and cannot be dispensed with; statutes and rules of court; LIMITATIONS; *Salus*); STATUTORY RECORD (exceptions not necessary to defects of substance. See MANDATORY RECORD; *Quod ab initio*; *Slacum*; *Smith v. Burrus*; *Sache*; WAIVER; *Mallinckrodt*, *supra*); STORY (a very important section quoted from); SUBJECT MATTER (essential to attract jurisdiction. *Andrews*, Vol. I; *Weltmer*: 268, Vol. III. See *Fauntleroy*, *supra*).

In *Fauntleroy v. Lum*, 210 U. S. 230, the conclusiveness of a judgment is considered. The strictest rule of *res adjudicata* was finally applied; *Res judicata facit ex albo nigrum*, etc., as will appear from results of courts of two great states, over which the federal court stands five to four.

Mississippi declared a certain contract a crime and unenforceable. But this crime was sued on in Missouri, and though void where made was held valid in Missouri; this judgment was then sued upon in Mississippi, which held *Crimen omnia ex se nata vitiat*; that the cause of action would not pass the general demurrer; that the general demurrer attached to the first fault; that the fact of jurisdiction of the person with only the exemplification of a judgment entry was not impervious to an inquiry as to whether there was a cause of action. *Quod ab initio non valet intractu temporis non conualescit*. *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265; *Andrews v. Andrews*, Vol. II, Gr. & Rud.

This judgment was removed into the Supreme Court of the United States and was reversed under the full faith and credit clause. Justice Holmes spoke for the majority and *arguendo* holds that a court can enter an enforceable judgment upon a simple contract where no consideration is shown. In other words that *no wrong* is nevertheless a *wrong* if only a court says so; or if a court enters a judgment on *no wrong described*, or *nothing*, that nevertheless something is adjudicated, and also that such a judgment is not vulnerable upon collateral attack. See § 171-261, Vol. I, Gr. & Rud., also *Lamplough*: 301, Vol. III; also PROCEDURE; SUBJECT-MATTER; *Debile fundamentum fallit opus* (Vol. II); STORY; *Weltmer*: 268a (Vol. III), also the maxims quoted by Justice White in the very able dissenting opinion.

Much might be instructively observed of this case which stands in defiance of the requirement that "*one must come into court with clean hands*"; *Nullus commodum capere potest de injuria sua propria*; *In pari delicto potior est conditio defendentis*; *Quando aliquid prohibetur, prohibetur omne per quod devenitur ad illud*. See Preface, DATUM POSTS.

The attempt to operate a government upon a written constitution without regard to the maxims of antiquity presents many incongruities in America. This is indicated by the struggle over the meaning of "Due Process of Law." See PROCEDURE, also PLEADINGS; Winona.

In *Londoner v. Denver*, 210 U. S. 373, is found a vindication of *Audi alteram partem* in reference to taxation that was refused in earlier cases. See *Breeze*, Vol. II, Gr. & Rud.

Fauntleroy and *Londoner* illustrate that the study of procedure is a study of government, also that the supposed distinction between adjective and substantive law is illusory.

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Evidence. See *Maxims and Cases*, §§ 269-273, Vol. I, also in Vols. II and III. From the mandatory record and the conserving principles of procedure are discoverable the leading rules of evidence. See *PROCEDURE*; *RES ADJUDICATA*; *ESTOPPEL*, §§ 171-201, Vol. I; *COLLATERAL ATTACK*, §§ 201-261, *id.*

From the conserving principles of procedure may be seen the utility of the rule requiring the best evidence; also the importance of the rule that "what ought to be of record must be proved by record and by the right record." *Campbell v. Porter*; 2, Vol. III. See *MANDATORY RECORD*; *ORAL EVIDENCE*; *PLEADING*; *PROCEDURE*; *RES ADJUDICATA*; *STATUTORY RECORD*.

See also the following topics: *ADMISSIONS OF RECORD* (effect. See *Posito*); *Pleadings as evidence* (*Boileau*: 43, Vol. III), *AUTHORITY* (an authority must be alleged and proved. See *RES ADJUDICATA*; *Rice*; *JURISDICTION*; *BEST EVIDENCE*; *MANDATORY RECORD*; *ORAL EVIDENCE*; *RES GESTAE*).

Circumstantial evidence, its value and effect (see *Hickory v. U. S.*: 194, Vol. III; *Spies*; *CRIME, post*); *Confessions* (see *Nemo tenetur seipsum accusare*); *Custom and usage* (see *Partridge*).

Estoppel—equitable estoppel (see *Pickard v. Sears*); *By deed* (see *Young v. Raincock*); *By record* (see *RES ADJUDICATA*). *Presumptions*, outline citation (see *Crime*); *Stand for proof* (see *Smith v. Burrus*). *Reasonable doubt* (*Actore*, Vol. II; *Bonnell*: 185, Vol. III). *Relevancy of evidence*. *System*; when one crime is admissible to prove another (see *P. v. Molineux*; *SYSTEM*; *Strong v. S.*: 213a, Vol. III).

Receipts; *refreshing memory*; *jurisdictional facts* must be alleged and proved (see *RES ADJUDICATA*; *AUTHORITY*; *Rice*—III.; *Sache*—code).

MAXIMS OF EVIDENCE: *Malum non præsimitur*; *Nemo præsimitur malus*; *Semper præsimitur pro negante*; *Nemo tenetur seipsum accusare*; *Ad questionem facti* (province of court and jury: *Merchants' Bank*; *Bonnell*: 185, Vol. III); *Præsumat pro sententia*; *Omnia præsumentur contra spoliatores* (*Armory*: 180, Vol. III); *Omnia præsumentur rite* (*Crepps*: 113, Vol. III); *Res inter alios acta*; *Res ipsa loquitur* (*Kearney*: 211, Vol. III; *Spies*; *Nil facit corporis*; *Quod constat clare*; *Probat is extremis*; *Ex uno omnes discas*; *Noscitur a sociis*).

Pleading. *Maxims, cases and leading rules*, §§ 273-279, Vol. I. From the definition that pleadings are the juridical means of investing a court with jurisdiction of a subject-matter to adjudicate it, pleadings are introduced. This definition is deduced from the conserving principles of procedure, the requirements of estoppel of record, *res adjudicata* and collateral attack. §§ 83-123, 171-261, Vol. I.

The view is presented that pleadings are indispensable in a constitutionalism for the formation of that record for the application of the rule that a court is bound by its record, also that the general demurrer searches the whole record and attaches to the first fault. These rules are of great significance in a government of limited and defined powers. §§ 56-61, Vol. I. Supporting these views reference is made to the titles: *PLEADING*; *PROCEDURE*; *RECORD*; *REPLICATION*; *STORY*; *SUBJECT-MATTER*; *THEORY OF THE CASE*; *VARIANCE*; *Verba fortius*; *WAIVER*; and particularly what is observed under *Quod ab initio non valet intractu temporis non convalescit*.

Important matters will be found under various titles. See *Los Angeles* (averring corporate existence); *Mallinckrodt* (general demurrer cannot be waived; exceptions relating thereto save themselves; they will keep); *Quod ab initio*; *Slacum*; *THEORY*.

Conclusions of law are void. *Mallinckrodt*: 12a, Vol. III; *PLEADING*; *Posito*; *Taylor v. Sprinkle*. *Prolixity* must be avoided; abbreviations may be used. See *PROLIXITY*. A cause of action must be stated. See *SUBJECT-MATTER*; *Quis, quid, coram quo*. A subject-matter must appear. See *SUBJECT-MATTER*.

Functions of pleadings. See *RULES OF COURT*; *Sache*; *Saunderson*; "What ought to be of record," etc.; *RES ADJUDICATA*; *VARIANCE*. *Conditions precedent*, how averred. See *PERFORMANCE*. *Defenses not pleaded* are waived. *Saunderson*; *Sache*. Must be true. *Posito*; *REPLICATION*; *TRUE*; *REPUGNANCY*; *SHAM PLEADINGS*; *Nihil possumus contra veritatem*. *Alder of pleadings*. *Mallinckrodt*; *Quod ab initio*; *REPLICATION*; *RES ADJUDICATA*; *THEORY*; *MISSOURI*.

Parties (2 pages, outline citation); *Idem Sonans*; Pitsnogle. Pleadings are to limit issues and to narrow proofs. *See* McDermott v. Severe; Martin v. Evans; MATERIALITY OF EVIDENCE; *Quod ab initio*; REPLICATION; RES ADJUDICATA.

Issues; importance of. *See* Sache; *Posito*; Piercy. General issue; objections to. *See* Piercy. Waiving of. *See* THEORY; MISSOURI; *Quod ab initio*.

Negligence; pleading of. *See* NEGLIGENCE; Rideout; *Placitum, q. v.*; Skinner. Prayer; office of. *See* PRAYER; Russell v. Shurtleff. *Ad damnum* limits. *See* McDermott.

Practice. The term Practice is often used synonymously with Procedure. Evidence and pleading may be included under the term Practice. In this work the word Procedure has been chosen to include evidence, pleading and practice. Rules of procedure are rules of practice; rules of evidence and pleading are often rules of practice. Therefore whatever relates to practice often extends over a wide range. *See* PRACTICE (1 page, outline citation); also the titles *Nemo tenetur seipsum accusare*; NEW TRIAL; NOTICE (Service of Process—Summons); Owen v. Weston (amendment of records); *Posito*; PROCESS; PRODUCTION OF DOCUMENTS; PROPERT AND OYER; PUBLICATION; Quinn (waiving of process); RECOURPMENT; REMOVAL OF CAUSE; REPLICATION (departure there shall not be. *See* THEORY; VARIANCE; WAIVER); RES ADJUDICATA; RIGHT TO BEGIN (see *Actore*); RULES OF COURT (limitations of power of legislatures and of courts); SEARCH OF PRISONERS (*Salus populi*); SEARCH WARRANTS (Semayne's Case); SEPARATION OF WITNESSES; Shoemaker (recoupment, set-off); Sperry (right of prisoner to appear, necessity for presence at trial; Munday: 79, Vol. III); SOVEREIGNTY (*Amicus curiæ*; *Quod ab initio*); Splitting causes of action (Ruckman; Kirven, Vol. II; RES ADJUDICATA); STIPULATIONS; WAIVER (appearance waives process; Quinn).

EQUITY. This work constantly presents the view that the formative maxims of equity as introduced and applied in later times have been constantly widened and deepened. To illustrate: The maxim that one must come into court with clean hands is better expressed in the law of the twentieth century by *Ex dolo malo non oritur actio*, or *Nullus commodum capere potest de injuria sua propria*, or *In pari delicto potior est conditio defendentis*. These latter maxims are only a freer expression of several of the equity maxims, which are introduced and taught as especially relating to equity. It is time for great governments hospitably to embrace the civil law, in its broadest expanse and not in stilted expressions and in shreds and patches. These views are extendedly discussed in Vol. I, Gr. & Rud. It is time that the law were taught as an entirety and not in individual branches. It is time to teach that a few fundamental principles underlie all protecting systems of procedure, and that these principles are identically the same. *See* PROCEDURE; PLEADINGS; THEORY; VARIANCE; RES ADJUDICATA; CODES (Vol. II). There is an intimate relation between equity and the genius of procedure. Procedure can be written from the principles of equity—from the maxims of the civil law. From § 10, Story's Pleadings, may be deduced the best definition of pleadings. That section is applicable to code, criminal and all other pleadings. *See* STORY, where that section is quoted.

As it is with Procedure, so it is with most other subjects of the law. One who broadly knows the principles of equity jurisprudence is necessarily well introduced to the entire body of the law. From these views this work is elaborated. Accordingly Equity is presented as one of the great branches. It seems well to emphasize its importance in all possible ways, for reasons indicated in Volume I. The fundamental maxims of equity are of the prescriptive constitution. These prevail over all conflicting laws.

See the following titles: MAXIMS; MARSHALLING OF ASSETS; Equitable estoppel (Pickard); *Qui prior est tempore*; REFORMATION OF DOCUMENTS; RESCISSION; SPECIFIC PERFORMANCE; SUBROGATION; ELECTION (see Streatfield); *Ubi jus ibi remedium*; *Lex non exacte*, etc.; *Melius est petere fontes quam sectari rivulos*.

CONTRACT. Defined; maxims and cases, §§ 280-289, Vol. I; *see also* Vol. II, also L.C. 301-417, Vol. III. The primary elements of contract, namely, mutuality, the assent, the offer and acceptance, are introduced under apt titles.

See also *Non hæc in fœdera veni*; Smout. Limitation of party contracted with. Boston Ice Co.: 320, Vol. III; Smout; Winterbottom. Contract by letter. See Patrick. Assent to carriers' tickets not presumed. Pa. R. R. v. Loftis; DURESS. See *Sasportas*. Necessaries. See Peters; Smout; MARRIED WOMEN; HUSBAND AND WIFE, Vol. II; Wanamaker.

The consideration essential. *Nuda pactio*. See *Ex nudo*, Vol. II. Relating to the legality of contract an instructive and rather unusual view is gained from connectedly considering, *Quod ab initio* and the maxims *Jus publicum privatorum* (Vol. II); *Nulla pactio efficitur potest ne dolus præstetur*; *Nunquam res humanæ*; *Nullus commodum capere*; *Pacta conventa, quæ neque contra leges, etc.*; *Pacta privata juri publico derogare non possunt*; *Privatis pactionibus non dubium est non lædi jus cæterorum*. See also, *Consensus tollit errorem*; *Modus et conventio vincunt legem*; WAIVER.

Contract to give immunity for tort. See NEGLIGENCE: cases. For crime. S. v. Beck. Limitations of legislative power to interfere with. See Millett; PRESCRIPTIVE CONSTITUTION.

Void in part. See Pigot; Russell v. Winne. Restraint of trade. See Mitchel: 373, Vol. III. Misrepresentation. See Van Houten; RESCISSION; Whitworth.

Negligence in executing. Williams v. Stoll; *Allegans contraria*, Vol. II. Legislative limitations to interfere with contract. Millett; POLICE POWER. Accident; contract against. See Paradine; Osgood; Polack.

The certainty required for contract is illustrated in *Smout v. Ilberry*, where the wife was not liable for necessities bought upon the account of her husband, whose death was not known to the creditor, who intended to continue the contract with the husband. See Boston Ice Co.: 320, Vol. III; *Non hæc*; Schuchardt; Patrick; LETTERS; OFFER. Both sides must be bound or neither. Cooke: 321, Vol. III; Schuchardt.

Classification of contracts influenced. See PROCEDURE. The foundation of a judgment may be learned from *Sache* and cases cited thereunder. See also Windsor: 1 and following cases, Vol. III. Deeds are mentioned. See SEAL. Infants cannot make. See Zouch; Craig. Renunciation of contract. See St. Louis Beef Co.; Cutter: 308: cases, Vol. III; Van Houten; Norrington. Privity. See Winterbottom; *Res inter alios*; *Non hæc*; *Id quod nostrum*, Vol. II. Implications. See Pinnington; Moller; St. Louis Beef Co.; Le Blanche; Schuchardt; LIEN; QUASI CONTRACTS. Contracts by letter. See Patrick. Assent to carrier's ticket not presumed. Penna. R. R. Marriage contracts void. See MARRIAGE CONTRACTS; Lowe; Scott.

See the following titles: MAINTENANCE; CHAMPERTY; BARRATRY; MARRIAGE; NECESSARIES (Wanamaker); COMMERCIAL PAPER (Miller; Swift; Young), also SALES; MISREPRESENTATION; MISTAKE; Moller (course of dealing establishes). See St. Louis Beef Co.; Smout; MONEY HAD AND RECEIVED; NECESSITY.

Caveat emptor, q. v., Vol. II, also R. v. — (cases); also L.C. 374-384, Vol. III. Waiver of rights. See WAIVER, Vol. IV; also, *Modus et conventio*; *Consensus tollit errorem*, Vol. II; STIPULATIONS; SUBROGATION; SPECIFIC PERFORMANCE; SURETIES; GUARANTY; OFFICERS. Payment; law of. See Tobey. Receipts; effect of. See Tobey. Construction of contract. St. Louis Beef Co.; Rodriguez; Rodgers; Smout; *Ut res magis*; *Verba intentione*. *Lex loci*. See Van Voorhis.

AGENCY. Maxims and leading cases, §§ 298-303, Vol. I; see also Vol. II; also cases in Vol. III.

The following titles may be consulted: *Qui per altum*; *Qui sentit commodum sentire debet et onus*; *Respondeat superior*. See *Idem agens et patiens esse non potest*, Keech v. Sandford, Vol. II; M'Manus; MASTER AND SERVANT; Merchants' Bk. v. State Bk.; Michoud v. Girod; *Nihil tam conveniens*.

Partners; duties of. See Patrick. Assumption of authority. See Patrick; Collen v. Wright, Vol. II.

Connecting lines of railway are. See Penna. R. R. v. Loftis. Contracts of agent; principal, when liable. See Thomson v. Davenport: 342, Vol. III. Strict rule as to deeds. See Elwell v. Shaw, Vol. II.

Commercial paper also. *See* Sturdivant: 410, Vol. III. Torts of agent; principal, when liable. *M'Manus*; *Rahmel*; *Respondeat superior*; *Qui sentit*.

Crimes of agent. *R. v. Michael*; *R. v. Almon*; *P. v. Robey*. Implied power of agent. *Schuchardt*; *Merchants' Bk.* Authority of agent; how construed. *Schuchardt*. How sign contract for principal. *Sturdivant*: 410, Vol. III. Notice to agent is notice to principal. *See* *Ross v. Houston*. *See* ATTORNEYS, Vol. II. Death revokes an agency. *Smout*; *Hunt*, Vol. II. Interested agent cannot act. *See* *Idem agens, supra*; also *Keech v. Sandford*, Vol. II; *Michoud*. Authority to make a deed must be given by deed. *Nihil tam*.

CRIME. Defined; maxims and cases, §§ 291-293, Vol. I, Gr. & Rud. Its leading maxim is, *Actus non facit reum nisi mens sit rea*: Act and intent must concur to constitute crime, Vol. II. *See* *P. v. Robey*; *R. v. Prince*. Explication of this maxim involves *M'Naghten's Case*: 195, Vol. III. Beyond these will be found the completest elucidation of that maxim and the elements of criminal law in *R. v. Allen* and following 100 cases, within 16 pages. These cases and the leads they afford will introduce the beginner and ever refresh the mind of the practitioner. In these few pages will be found an epitome of criminal law. *See* also §§ 291-294, Vol. I. Accordingly all the great maxims, great cases and great discussions are led to.

The setting of these criminal cases has been with a view to showing the interactions of crime, tort, contract and procedure. From a great maxim much may be judged of the interdependence of legal subjects. *See* *In jure non remota*, Vol. II. Also an application of this maxim in the "*Squib Case*."

Criminal matter diffuses itself throughout the work. *See* §§ 291-293, Vol. I; *C. v. —* (cases); *P. v. —* (cases); *R. v. —* (cases); *S. v. —* (cases); *U. S. v. —* (cases). From these cases others are referred to.

Actus non facit reum, etc. *See* *Levett's Case*; *P. v. Robey*; *R. v. Prince*; *NECESSITY*; *DRUNKENNESS*; *U. S. v. Drew*; *Pirtle v. S.*; *S. v. Linkhaw*; *S. v. Homes*; *INTENT*; *MALICE*; *Hickory v. U. S.*: 194, Vol. III. *Ignorantia legis neminem excusat*. *See* *Levett's Case*; *NECESSITY*; *R. v. Prince*; *R. v. Esop*. *Ignorantia facti excusat*. *See* *Levett's Case*. *Necessitas inducit privilegium quoad jura privata*. *See* *NECESSITY*; *R. v. Dudley*; *SELF-DEFENCE*.

Coercion. *See* *NECESSITY*; *C. v. Neal*. Self-defence. *See* *NECESSITY*; *U. S. v. Holmes*; *Hickory v. U. S.*: 194, Vol. III; *Squib Case*. Sanity presumed. *See* *NECESSITY*; *S. v. Marler*: 188, Vol. III; *M'Naghten's Case*: 195, Vol. III. *Res ipsa loquitur*. *C. v. York*: 197; *Kearney*: 211, Vol. III. Continuity presumed. *M'Naghten's Case*, Vol. III.

Circumstantial evidence. *Hickory v. U. S.*: 194, Vol. III; *Spies v. P.* Intent, how proved. *Spies*; *C. v. York*: 197, Vol. III. Recent possession of fruits of crime. *R. v. Partridge*: 190, Vol. III. System to prove intent. *See* *SYSTEM*; *P. v. Molineux*; *Strong v. S.*: 213a, Vol. III; *Montgomery v. S.* Negligence, when criminal. *See* *NEGLIGENCE*; *R. v. Lowe*; *R. v. Longbottom*. Conspiracy; tacking and collateral intent. *See* *CONSPIRACY*, Vol. II; *Spies v. P.*; *P. v. Lawrence*; *C. v. Moore*; *In jure non remota*. Larceny. *See* Vol. II; *R. v. Thurborn*; *S. v. Homes*. Infants; crimes of. *See* *R. v. York*; *Godfrey v. S.*

What may be declared a crime. *See* *POLICE POWER*. Crimes are local. *P. v. Cæsar*; *R. v. Keyn*: 171; cases, Vol. III. Must be prosecuted within the bar of limitations. *See* *LIMITATIONS*. No rights can arise from. *See* *Fauntleroy v. Lum*, 210 U. S. 230; *Riggs v. Palmer*; *Bentley*, Vol. II.

See also *THREATS* (*P. v. Campbell*); *NUISANCE* (*P. v. Cunningham*); *FALSE PRETENCES* (*P. v. Johnson*, also *R. v. Wheatley*: 19, Vol. III); *PERJURY*; *PRISONERS*; *RAPE*; *ROBBERY*.

TORT. Defined, § 291; Maxims and Leading Cases, §§ 295-296, Vol. I; Maxims and Leading Cases in Vol. II. *See* Foreword, *Id.* *See* Index, Vol. III. *See* title *TORT*, Vol. IV, for maxims and cases. The topic *NEGLIGENCE* introduces some of the most important principles, among which is the "*Squib Case*" (*Scott v. Shepherd*). This case and the principle it elucidates should be mastered. The principle, "*One is presumed to intend the natural, direct and probable consequences of his act*," pervades almost all branches of the law. *See* *In jure non remota*, also *Ignorantia legis*, Vol. II. Many instructive cases are cited in relation to the "*Squib Case*."

FOREWORD

Legislature cannot declare. *See* POLICE POWER; Scott v. McNeal; Tyler v. Pomeroy; JOINT TRESPASSERS, Kirkwood, Vol. II. *Actus Dei* excuses, except where mixed with negligence or illegality. Salisbury; Rodgers.

Under the titles TORT, NEGLIGENCE, DAMAGES, and *Volenti non fit injuria* will be found much apt citation. See the following in relation to titles presented: Alienating affections (Lynch); Enticing to break contract (Lumley; Lynch). Animals, liability for (May; Loomis). Assaults (Stephens). Children; liability of (Squib Case); are liable like adults (Squib Case); parents not liable to (Roller). Contribution among wrongdoers (Merryweather). Deceit; misrepresentation (Patrick; P. v. Johnson; R. v. — cases). Fraud of the agent is fraud of the principal (Cornfoot: 385, Vol. III; M'Manus; Merchants' Bk.—Corporation). *See* MASTER AND SERVANT; DEFAMATION; LIBEL; SLANDER (Pollard; Smith v. Burrus—Candidates); of title (Malachy).

Malicious acts. *See* Thomas v. Winchester; McCordle; Marzetti; NEGLIGENCE (6 pages); NUISANCE; St. Helen's; R. v. — (cases). Personal injuries. *See* Squib Case; NEGLIGENCE; OFFICERS (Spalding; S. v. — cases; Stewart v. Cooley; Stewart v. Case). Privacy; right to. *See* Id. Proximate cause; Remoteness. *See* Squib Case; Missouri, K. & T. R. R.; SEDUCTION. Title does not pass upon judgment. *See* Miller v. Hyde. Trespasser can take no benefit. *See* Martin; *Nullus commodum*.

Actus Dei. *See* NEGLIGENCE; *Juris præcepta sunt hæc: Honeste vivere, alterum non ledere, suum cuique tribuere; In jure, Vol. II; Necessitas; Qui primum peccat ille facit rixam; Squib Case; Sic utere tuo; Volenti non fit injuria.*

DAMAGES. Outline citation, see § 67, Vol. I; also Vol. II, wherein are cited the maxims and cases relating thereto. Further matter pertaining to the subject will be found under the titles *Le Blanche* (breach of contract); LIQUIDATED DAMAGES; Martin v. Porter (damages for mining mineral); Marzetti (exemplary damages); NEGLIGENCE; *Nullus videtur*; Osgood (immunity from, may be stipulated for); RECOUPMENT (see also Shoemaker); *Salus populi suprema lex*; Sharp v. Powell (remoteness—*In jure*, etc.); St. Louis Beef Co.; TORT; *Ubi jus ibi remedium; Volenti non fit injuria.*

CONSTRUCTION. §§ 297, 297a, Vol. I; CONSTRUCTION, Vol. II; Leading Cases, 214-260, Vol. III. Construction should be considered in connection with the prescriptive constitution, which affords its fundamental principles. The view is advanced that the leading branches of the law in both England and America are written from the same elements and from the same foundations of sociology. Therefore, the maxims presented in this work should be familiar to every constructionist. The cases show that upon the philosophy of these maxims construction proceeds.

Reference to the following topics in this volume will afford many rules and instructive viewpoints. *See* MAXIMS; *Melius petere; Posito uno.*

Fundamental law governs. *See* *Lex non exacte; MAGNA CHARTA; Posito; Regula pro lege, si deficit lex.* Statutes, codes and practice acts are construed according to fundamental law. Lonstorf; Los Angeles v. Davis; Sexton.

Statutes, 40 rules relating to. *See* STATUTES; S. v. Kelly; Pabst. Procedure, important rules that govern. *See* PROCEDURE; THEORY; VARIANCE; RULES OF COURT; *Salus populi suprema lex*; WAIVER. *See* Conserving Principles of Procedure, §§ 83-123, Vol. I. Codes must be construed *in pari materia.* *See* CODES, Vol. II; PROCEDURE.

Of state statute by state court conclusive. Pabst; STATUTE.

Ita lex scripta est. *See* *Lex non exacte; Verba nihil operari.*

Mandatory and directory statutes. *See* MANDATORY; REMEDIAL; REPEAL; STATUTES; PROVISOS; PREAMBLES; *Noscitur a sociis; Res ipsa loquitur; Probatis extremis præsumuntur media.* Pleadings are strictly construed. *See* *Verba fortius*; PLEADING; *Posito*; RES ADJUDICATA. Every presumption is against a pleader. *See* *Verba fortius*; THEORY; PROCEDURE. Denials are strictly construed. *See* *Posito.*

Important rules. *See* PROCEDURE; RES ADJUDICATA. Aider, limitations of rules of. *See* AIDER, Vol. I; Dobson: 232a, Vol. III; *Quod ab initio*; THEORY.

Oral evidence, rules relating to. *See* ORAL EVIDENCE; "What ought to be of record must be proved by record and by the right record." *Expressio unius*, Vol. II. Practical construction. *See* § 297a, Vol. I; THEORY.

Ut res magis valeat quam pereat. *Roe v. Tranmarr*; *Shelley's Case*; *Sexton*; *Lonstorf*; THEORY.

In pari materia. *See* RODRIGUES; STATUTES; *In pari materia*; CODES, CONSERVING PRINCIPLES, *Concordare*, Vol. II. Good faith required. Courts will not be deceived; substance, not form, will be sought. *S. v. Kelly*; *Pabst*; STATUTES.

See CONSTRUCTION and titles there referred to, Vol. II.

Constitutional Law. *See* §§ 262-269, Vol. I, wherein maxims and cases are cited; CONSTITUTIONAL LAW and matters cited thereunder, Vol. II; also many cases cited in the index of Vol. III.

The attempt to formulate all of imperial law in written constitutions has misled American authors and courts. *See Lex non exakte definit, sed arbitrio boni viri permittit* and matters referred to in relation to this maxim; likewise *Melius petere fontes quam sectari rivulos* and PRESCRIPTIVE CONSTITUTION.

That constitutional law has a much wider scope than is popularly accorded it may also be gathered from PROCEDURE, THEORY OF THE CASE, VARIANCE, WAIVER and *Verba fortius accipiuntur contra proferentem*. These topics will disclose the fact that the grounds and rudiments of law are silent factors which are imported by construction. Constitutional law cannot be taught as an individualized branch in a water-tight compartment. The law is an entirety. Preface, *Bish. New Crim. Law*, p. vi; ADJECTIVE LAW; SUBSTANTIVE LAW.

From the formation of the American government arose two parties or sects, one the strict, and the other the liberal, constructionists. These are referred to in relation to CONSTRUCTION, Vol. II, also *Lex non exakte*, etc. These have ruled courts in alternation. *See South Carolina v. U. S.*; *S. ex rel. Henson v. Sheppard*; THEORY OF THE CASE. In Illinois are many illustrations of these fluctuations; in this state are found many examples of liberal construction. To illustrate: A statute provided a notice to quit must be given thirty days; but this statute was held not to apply to lettings for a less period than thirty days. Any other construction would be absurd. *Dunn v. Trustees*, 39 Ill. 578. *See* REASON; *P. v. Turner*: 252; *Langabier*: 174a; *Taylor v. Sprinkle*; *Quinn*; *Thomas v. R. R.* In many cases both constitutions and statutes yield to fundamental law. *Dimes*: 176; *O'Connell*: 224; *Indianapolis*: 223, Vol. III. *See* Chap. III, Vol. I.

See the following topics: LEGISLATIVE POWER; LIBERTY OF THE PRESS; LIMITATIONS OF INDEBTEDNESS; LIMITATIONS OF GOVERNMENT; Loan Association; POLICE POWER; PROCEDURE; RULES OF COURT; *S. ex rel. Coleman v. Kelly*.

Legislatures cannot legalize a tort. *See Louisville*. A cause of action cannot be declared. *Scott v. McNeal*; PRESCRIPTIVE CONSTITUTION. Right to destroy property. *See Miller v. Horton*. Due process of law. *See Paraiso*; *Winona*; TAXATION; PROCEDURE. *Audi alteram partem*. *See Ruckman*; NOTICE; *Rouse*; TAXATION. Equal and uniform law. *P. ex rel. Armstrong v. Warden*; PROCEDURE.

Imprisonment in violation of constitutional law. *See Royall*.

Division of state power. *See* PROCEDURE; *Turney v. Barr*.

Protection of property. *See* PROPERTY; REMEDIES; RECORD; *Londoner*, 210 U. S. 373.

Implications. *See Lex non exakte*; *Qui concedit*; PROCEDURE; THEORY; RULES OF COURT; *Salus*; SUBJECT-MATTER; SUPREME COURTS. Civil rights. *See Strauder*.

Is paramount law. *Virginia Coupon Cases*: 285a.

Writing and teaching permissive of the view that Parliament is omnipotent except when restrained by the word or words of a constitution, with the finger thereon, have been very misleading. *South Carolina v. U. S.* The fundamentals of the six leading subjects of the law rest upon the prescriptive constitution,

and these fundamentals cannot be changed without disturbances of the entire juridical system. See THEORY OF THE CASE; VARIANCE; CODES, Vol. II.

MAXIMS. The design of this work is to present the maxims in a more accessible and favorable light than heretofore; it is designed to be a maxim work. Imbedded in the maxims presented in this work lies the prescriptive constitution of antiquity (from the Roman, Norman and English). It is sought to show that all the leading subjects of the law depend upon a few maxims which it is the effort to gather and cite therewith. See Chapter X, Vol. I: Leading Subjects Epitomized. This performance may also be judged from Codes, Contracts, Damages, Procedure, *Res Adjudicata* and various other subjects. Accordingly the maxim is introduced and elaborated to prove that it is the warp and woof of the law.

The canons of construction are only maximized rules, where they are not the maxims themselves. The prescriptive constitution is not separable from construction and the maxims. Upon these depend all branches of law, and the true interpretation of all laws. In these lie that fundamental law, the comprehension of which is giving the American student so much confusion. A failure rightly to comprehend the foregoing facts is a serious impediment in the way of juridical progress.

In the law of contract four maxims are of leading consequence, namely: *Non hæc in fœdera veni, Ex nudo pacto non oritur actio, Caveat emptor and In pari delicto potior est conditio defendentis.* (*Pacta conventa.*) By turning to these maxims, therefrom may be traced great discussions. As expressed in the Latin they are most easily turned to, also indexed and traced. Denial or impairment of these maxims would create profound disturbances throughout all branches of the law. Considering what is moored to them, they appear of equal dignity with any principles reaffirmed in written constitutions.

In relation to Codes (see Vol. II) is attempted an explication of three fundamental maxims, namely: *De non apparentibus et non existentibus eadem est ratio, Frustra probatur quod probatum non relevat* and *Verba fortius accipiuntur contra proferentem.* What has happened to states whose courts have disregarded these maxims in construing codes may be judged from various discussions of this work. See THEORY; VARIANCE; WAIVER; PROCEDURE; PLEADINGS; *Verba fortius; Regula pro lege si deficit lex.*

From the facts discoverable in the supreme court reports of states which have ignored or denounced those maxims, it seems well to repeat: "Remove not the ancient landmarks which thy fathers have set." See Preface, DATUM POSTS; CODES; ILLINOIS; MISSOURI; OHIO; NEW YORK.

Reference to the following topics will illustrate the foregoing views: *Leges non verbis; Leges posteriores; Lex neminem cogit ad vana; Lex non exacte* (6 pages); *Levett's Case (Actus non facit reum; P. v. Robey); MAXIMS* (2 pages); *Melius petere fontes* (7 pages); NECESSITY.

A court is bound by its record. See What ought to be of record, etc.; PLEADING.

Maxims denounced. See LITERATURE; Los Angeles (*In pari materia*); Missouri, K. & T. R. R. v. Wood (*In jure*; S. P., Squib Case; Lord Balliffs); M'Manus; Merryweather v. Nixon (*In pari delicto*); NEGLIGENCE; *Pacta.*

Actus Dei (See NEGLIGENCE; Rodgers; R. v. —cases); *Audi alteram partem* (See NOTICE; SERVICE OF PROCESS; TAXATION; Winona); *Ex dolo malo non oritur actio* (See *Nullus commodum; RES ADJUDICATA*).

Lex neminem cogit ad impossibilia; Ita lex scripta est. See *Lex non exacte; Regula pro lege*; maxims of PROCEDURE; RES ADJUDICATA.

Nullus commodum capere; Nullum tempus occurrit regi; Marriott (Interest reipublicæ; RES ADJUDICATA); McDermott v. Severe (Ad questionem facti; Merchants' Bank v. State Bank—province of court and jury; Ryder v. Wombwell, sub Peters; R. v. Poole; Schick v. U. S.; Schuchardt); M'Manus (Respondet superior; Qui sentit commodum; In actione juris; Merchants' Bank; NEGLIGENCE); Marzetti (Ubi jus); Melius est petere fontes quam sectari rivulos; Michoud (Idem agens et patiens esse non potest; S. ex rel. Henson v. Sheppard); Modica circumstantia; Modus et conventio. See *Res inter alios; Res ipsa loquitur.*

Necessitas inducit privilegium (6 pages. See *Actus Dei*; Rodgers); *Nemo debet bis vexari* (See RES ADJUDICATA; Outram: 25; Cromwell: 26, Vol. III); *Nemo debet esse iudex* (S. ex rel. Henson v. Sheppard; Dimes: 176, Vol. III; Michoud; RES ADJUDICATA); *Non hæc in fœdera veni* (See Smout; Boston Ice Co.: 320, Vol. III); *Noscitur a sociis*; *Nunquam res humanæ* (See *Pacta*; *In pari delicto*; *Summa ratio*); *Omne majus continet in se minus* (See Dobson; 232a (Vol. III); *Omnia præsumuntur contra spoliatores* (See Armory: 180, Vol. III; Rice v. Travis); *Omnia præsumuntur rite* (See Crepps: 113 and following cases, Vol. III); *Omnis innovatio* (*Ubi jus incertum*; *Res est misera*; *Omnis ratihabitio*; RATIFICATION).

Posito uno oppositorum, etc. (See *Allegans contraria*, Vol. II; *Nihil possumus contra veritatem*; REPLICATIONS; REPUGNANCY; RES ADJUDICATA; Rideout; SHAM PLEADINGS); *Qui per alium* (See M'Manus); *Qui primum peccat* (See NEGLIGENCE; Squib Case; M'Manus; Morgan); *Qui prior tempore potior est jure*; *Qui sentit commodum* (See M'Manus; *Respondeat superior*); *Quod ab initio* (See WAIVER; Fauntleroy, 210 U. S. 230, 246).

Regula pro lege si deficit lex (See *Lex non exacte*; *Res ipsa loquitur*; NEGLIGENCE; Nichols); *Res est misera* (See *Omnis innovatio*); *Res inter alios acta*; *Respondeat superior* (See M'Manus; *Qui sentit commodum*); *Res non potest peccare* (See Hill v. Boston, Vol. II); *Roy n'est lie per ascun statute, si il ne soit expressement nosme* (Barron: 241, Vol. III); *Salus populi suprema lex*; *Si citatus aliquis non compareat*; *Sic utere tuo* (See *Juris præcepta*); *Summa ratio est quæ pro religione facit* (See *Nunquam res humanæ*).

Ut res magis valeat quam pereat; *Verba fortius* (See Dovaston: 217, Vol. III); *Volenti non fit injuria* (See NEGLIGENCE; S. v. Beck); What ought to be of record must be proved by record and by the right record (See ORAL EVIDENCE; PROCEDURE; PLEADING; RECORD; THEORY; VARIANCE; WAIVER; Sanford v. Edwards; Slacum; Smoot's Case; REPLICATION; RES ADJUDICATA).

REAL ESTATE. See REAL ESTATE, outline citation. The law of real estate is quite completely interwoven with other branches of the law. Much of it relates to deeds, one of the classes of contract; a leasehold estate for any duration is personality; the mortgage is an incident of a contract. "Once a mortgage, always a mortgage." See ORAL EVIDENCE. The statute of frauds involves various contracts relating to real estate. See FRAUDS AND PERJURIES, Vol. II; Lester: 341, Vol. III.

See the following topics: LIGHT AND AIR; LIMITATIONS; PART PERFORMANCE; *Quicquid plantatur* (fixtures; Elwes, Vol. II); REAL ESTATE; adverse possession; Smith v. Thackerah (easements); SPECIFIC PERFORMANCE (of contract for). Deeds, see Foreword, Vol. II. See also Lester: 341, Vol. III.

Bona fide purchaser of. Le Neve: 396, Vol. III. Defense of. See SELF-DEFENSE; TORT. Deeds, construction of. See Shelley's Case; *Ut res magis valeat*; FOREWORD, Vol. II.

MISCELLANEOUS. See observations under *Lex non exacte*; LITERATURE; *Melius petere fontes*; MARTIAL LAW; Martin v. Evans (what is a dictum—see RES ADJUDICATA); MASTER AND SERVANT. See M'Manus; *Respondeat superior*; MERGER; MISSOURI.

Morality. See *Posito*; *Nunquam res humanæ*; *Nihil possumus contra veritatem*; Robinson v. R. R.; Riggs v. Palmer; *Nullus commodum capere*; *Nunquam res humanæ*; OHIO; PROCEDURE (wherein are discussed the grounds and rudiments of law).

Illinois (see Vol. II, also Quinn v. P.; Taylor v. Sprinkle; PROCEDURE; Thomas v. R. R.).

LEGISLATURE; POLICE POWER; SOVEREIGNTY; STATES; STAMPS; SUNDAY LAW; TECHNICALITIES; TERMS OF COURT; ADJECTIVE AND SUBSTANTIVE LAW (see Texas R. R.).

Finally it is observed that the organization of this work must be comprehended in order to utilize the matter it intensively presents. For this end, references are necessarily abbreviated. To illustrate: Under MAXIMS, *supra*, are found Dovaston: 217; also Barron: 241; next is found Lester: 341; also Le Neve: 396. All of these are LEADING CASES in Vol. III, and will be found therein according to number.

FOREWORD

On pages 585-850 are found the LEADING CASES. These are led to by reference from the abbreviation "L. C." (Leading Case); also by the title of the case followed by a colon and the number of the case as last above illustrated. The reader should familiarize himself with the Leading Cases (Volume III) and the arguments they support, and the uses made of them throughout this work.

Therefore the significance of "L.C." and what it leads to must be well understood. The necessary understanding will come from a perception of the matter in Volume III, and how this is cited and incorporated throughout the work to support all parts thereof.

C. stands for Commonwealth; *cf.* for *confrare* (compare); P. for People; *q. v.* for *quo vide* (which see); R. R. for Railroad Company; R. for *Rez* (King) or *Regina* (Queen); S. P. for Same Point; S. for State; U. S. for United States.

GROUND S AND RUDIMENTS OF LAW

VOL. IV

TEXT-INDEX—Continued

LEAKE v. BENSON (1877), 29 Grattan, 153 (married women's contracts in reference to their separate estates). *Cited*, § 64, Hughes' Conts.

LEASE: See LANDLORD AND TENANT. 2 Bouv. Dic. 154-159; And. 606; 8 Mews' E. C. L. 801-872. Renewals of by implication. Clayton; *Res ipsa loquitur*.

A leasehold estate is personal property. Church v. Griffith (1848), 9 Pa. 117, 49 Am. Dec. 548; 4 Kent, 93; Petition of Timothy Gray (1809), 4 Mass. 419; Brewster v. Hill (1818), 1 N. H. 350; Murdock v. Ratcliff (1834), 7 Ohio, 119, Herm. Ex. 116, 220; Clayton. *Contra*: McKee v. Howe (1892), 17 Colo. 538.

Assignments of. Crouse v. Mitchell (1902), 130 Mich. 847, 97 Am. St. 479. Effect of assignment on covenants. Ans. Conts. 232. See LANDLORD AND TENANT.

Construction. Horner v. Leeds; Dumpor's Case (conditions); Spencer's Case (covenants); Clayton.

LE BLANCHE v. LONDON, etc., R. R. (1876), L. R. 1 C. P. Div. 286, Sedgk. Dam. 218, Beale, Dam. 174, Pars. Conts. 283, Whart. 25; Suth. Dam. 91, 155, 899, 938, 939; 3 Mews' E. C. L. 52, 56 (Carriers); 5 *id.* 274 (Damages—what are natural consequences of wrongful act), 7 *id.* 371 (Fraud and misrepresentation—effect of time-tables).

Le Blanche stated: The railroad company sold Le Blanche and his friend tickets from Liverpool to Scarborough. The tickets had indorsed on each the words:

"Issued by the London, etc. R. R., subject to the company's regulations and to the conditions of the time-tables of the respective companies over whose lines this ticket is available." And this was the time-table for the 2 P. M. train:

"Leave Liverpool	2:00 P. M.
Arrive Manchester	3:05
Leave	3:20
Arrive Leeds	5:00
Leave	5:20
Arrive York	6:05
Arrive Scarborough	7:30"

Certain conditions were set out in the time-table which were the subject of the discussion. The train started two minutes late and constantly lost time, and lost connection at Leeds for York. The next train for Scarborough was due at the latter place at 10 P. M. But L., instead of waiting for that train, ordered a special

Le Blanche.—

train, which cost him 11l. 10s., which carried him to Scarborough between 8:30 and 9 P. M. Less than half an hour was saved. No special damage was shown. The merits of the case rested on the extra cost of the special train and inexcusable negligence upon the part of the railroad company, which showed no interruption from accident or *vis major*, and the evidence showed negligence, and consequently the carrier was held liable. Duty of one to minimize damages. Smeed, sub Hadley.

Denton v. Great Northern R. R., Finch Cas. 21, Suth. Dam. 91, 938, 939, Mews' E. C. L. 1 Add. Conts. 651, 2 *id.* 1211, Ans. Conts. 34, 1 Chit. Conts. 735, 1 Add. Torts, 651, 2 *id.* 1195, 1211. See Denton.

Common carriers; railroad time-tables are contracts. R. R. is liable for not running an advertised train. It must use diligence to conform to published schedules and notices. *Vis major* alone will excuse. Hutch. Carr. 603-608.

In Savannah R. R., 58 Ga. 180, a dancing master was unable to fill his engagement to his class. S. P. as in Le Blanche (one is presumed to intend the natural, direct and probable consequences of his acts). Hansley, 115 N. C. 602, 117 N. C. 565, 32 L. R. A. 543 (stating Le Blanche and Denton).

Time-tables annex themselves to the ticket contract. *Expressio eorum*; Gordon, 52 N. H. 596; Sears, 4 Allen, 438, Harr. Conts. 54.

LEE v. GRIFFIN: L. C. 338.

LEE v. MUGGERIDGE: L. C. 318.

LEGAL CONCLUSIONS: See CONCLUSIONS OF LAW; Cruikshank: 232; Howard v. S.; 12 Encyc. Pl. & Pr. 10-20; Starbuck: 263; Gay: 138.

Are insufficient. § 178, Gr. & Rud.

LEGAL TENDER: Gold coins are such at their nominal value, and if below that in weight, then at their actual value in weight. § 3584, R. S. U. S. *Treasury notes and standard silver dollars, for all payments.* Fractional silver coins for all debts not exceeding ten dollars. Minor coins: Five, three, two and one cent pieces, for all debts not exceeding 25 cents. 2 Bouv. Dic. 170: cases. See Gold, Silver, Money (Bouv. Dic). *Legal tender; what is.* Tobey: cases.

LEGAL TENDER ACT: 1 Suth. Dam. 210.

LEGAL TENDER CASES: See Tobey v. Barber.

LEGATOS VIOLARE CONTRA JUS gentium est: It is contrary to the law of nations to do violence to ambassadors. To protect these, the supreme court of the United States has original jurisdiction. *Telefsen v. Fee*; see **CONSULS**; *Legatus, regis, etc.* Protection of ambassadors is a very high obligation of public policy.

LEGES NON VERBIS SED REBUS sunt impositæ: Laws are imposed on things, not words. 11 Coke, 101; *S. v. Baughman*: 268; *Wonderly*: 102; *Kyle*: 348. See **SUBJECT-MATTER**; **CAUSE OF ACTION**; *Fabula non judicium*. §§ 13, 15, 21, 22, 23, 48, 147, 224, 267, 286, 329, 349, 353 *Hughes' Proc.*

This maxim is often cited to the idea that the law looks to substance, not words. Acts of the Apostles, chs. 25, 26. It goes to the idea that a court cannot act on conclusions of law, but must acquire jurisdiction of a certain subject-matter described. *Cruikshank*: 232. And it must be real and *bona fide*. *S. v. Baughman*: 268. A certain thing must be before a court. *Rushton*: 5; *Sto. Pl.* 10; *J'Anson*: 91. Else there applies *Nihil habet forum ex scena*: The court has nothing to do with what is not before it. *De non apparentibus*; *Non verbis sed ipsis, etc.*; *Nomen non sufficit, etc.*; *Nihil facit error, etc.*; *Nomina sunt mutabilia, etc.*; *Non quod dictum est; Ex facto oritur jus; Fabula non judicium*; *California*: 270. See *idea in Ex nudo pacto, etc.*; *Jurisdictio, etc.*; *Jurisdictio est potestas, etc.*; *Jus publicum privatorum, etc.*

Words never constitute an assault. *Cool. Torts*, 29; *Ireland*, 5 fa. 478, 68 Am. Dec. 715; *S. v. Fanning* (1886), 94 N. C. 940, 55 Am. Rep. 653. *But may an affray.* *Cool. Torts*, 29, 2 Bish. C. L. 125, 704, 1 Wat. Tres. 3, 3 Gr. Ev. 122-127; *Goldsmith*, 61 Vt. 488, 15 Am. St. 923, 4 L. R. A. 500.

The constitution acts upon things, not words. *Marshall, Craig v. Missouri* (1830), 4 Pet. 410-465, *Marshall's Const. Dec.* 617-643.

Words as a judicial element should be well comprehended. They are to be considered in torts (defamation); criminal law (threats; provocation); contracts (consideration); construction (*Verba, etc.*).

LEGES POSTERIORES PRIORES CONTRARIAS abrogant: When the provisions of later statutes are opposed to those of an earlier, the earlier is considered as repealed. *Bro. Max.* 26-34. *Dash*: 237a; *Fletcher v. Peck*; *Bronson*: 238; *Terry v. Anderson*; *Suth. Stat.*, End. Stat., § 182; *Constitutiones tempores, etc.* See **STATUTES**; **CONSTRUCTION**.

LEGIS INTERPRETATIO LEGIS VIM obtinet: The construction of law obtains the force of law. *Branch, Princ. Ejus interpretatio, etc.*; *Cujus est instituere, etc.*; § 31, *Hughes' Proc.*; §§ 240, 241, *Gr. & Rud.*

LEGISLATIVE JOURNALS: *Suth. Stat. Construc.* 4, 48, 53, 181. Effect of, as evidence. *Union Bk. v. Commissioners*, citing 93 cases; *Post v. Commissioners*, *Cool. Const. Lim.* 136, 168, 1 Gr. Ev. 491, 1 Wh. Ev. 637 (3d ed.); *P. v. Starne* (1864), 35 Ill. 121, 85 Am. Dec. 348-364, ext. n.; *Lyons v. Woods* (1894), 153 U. S. 649. See *Evans v. Browne* (1869), 30 Ind. 514, 95 Am. Dec. 710.

What ought to be of record must be proved by record. *Commissioners v. Snuggs* (1897), 121 N. C. 394, 39 L. R. A. 439; cited, 180 U. S. 514; 178 U. S. 565. Are admissible to prove the facts they show,

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S. ex rel. Cheyenne v. Swan (1897), 7 Wyo. 166, 40 L. R. A. 195. Are conclusive. *Taylor v. Beckham* (1900), 178 U. S. 549; cases, 108 Ky. 278, 94 Am. St. 357; *Iversile*: 46; *Montgomery*: 47.

As evidence of the passage of laws. *Montgomery*: 47; cases, 47 Am. St. 814-823; 51 Am. Dec. 516-623; 75 Am. St. 889.

LEGISLATIVE POWER: See **CONSTITUTIONAL LAW**; **POLICE POWER**; **PRESCRIPTIVE CONSTITUTION**; *Suth. Stat.*; *Cool. Const. Lim.*; *Cool. Tax.*; 2 *Bouv.* 173-183; *And. Dic.*

Limitations of. *Indianapolis R. R.*: 223; *Reubens*, 13 N. Y. 448; *stated*, *Bliss Pl.* 10, n. (3d ed.). See **DIVISION OF STATE POWER**; *Dennett*: 145; *P. v. Turner*: 252. *Is only limited by federal and state constitutions.* *Berger*, 193 Mo. 90, 122 Am. St. 472.

To interfere with property. *Taylor*: 219a; *Miller v. P.*; **POLICE POWER**; *Sharpless and Thorpe cases*; *Loan Ass'n v. Topeka*. *To declare crime.* See *Ex post facto laws*; **POLICE POWER**; *P. v. Turner*. *To impose contracts.* *Millett v. P.* See **LEGAL TENDER**, §§ 137-170 *Gr. & Rud.* (limits of).

Minor's lands; sale of, depends on statute; courts of equity have no inherent power. *Heady*, 203 Mo. 100; 120 Am. St. 643-649. *Where there is no assent, express or implied, it is tyranny to impose.* *Bartholomew*: 302; *Bull v. Griswold*.

To interfere with procedure. Pp. 8-17, *Hughes' Proc.*; *Indianapolis*: 223; **CONSTITUTIONAL LAW**; **STATUTES**; **CONSTRUCTION**; **MAXIMS**.

Delegation of. *Harmon*, 66 Ohio, 249, 58 L. R. A. 618 (to state board of dentists).

Statutes are set aside when in violation of fundamental law. *Keech v. Atwood*, 148 Miss. 224, 118 Am. St. 576; *Lester*: 341; *Oakley*: 222. See **PRESCRIPTIVE CONSTITUTION**.

LEGISLATURES: Limitation of power of to affect procedure. § 16, *Hughes' Conts.*; *Loan Association*; *Russell*. See **LEGISLATIVE POWER**.

Limitations of powers are only found in constitutions, national and state. *Ratliff v. Wichita*, 74 Kans. 1, 118 Am. St. 298 (discusses *Munn*).

Height of buildings may be limited. *Welch*, 193 Mass. 364, 118 Am. St. 523.

LEISEY v. HARDIN (1890), 135 U. S. 100, 34 L. ed. 128-150; cases, 2 *Thayer*, *Const. Cas.* 2104, *And. Am. Law.*

Commerce (Original Package Case); *Austin v. Tennessee* (court will not take judicial notice that cigarettes are noxious); *Gibbons*.

LE NEVE v. LE NEVE: L. C. 396.

LENT v. PADLEFORD: See **GUARANTY**.

LESTER v. FOXCROFT: L. C. 341.

LETTERS: Contracts by. *Adams*: 326; *Burton v. U. S.*; 2 *Bouv.*; *And. Dic.*; 8 *Mews' E. C. L.* 1609-1612. Cited, §§ 44, 47-49, *Hughes' Conts.*

Of credit. *Whart. Conts.* 25a; *Coolidge*.

Carbon copies are admissible in evidence as originals. *Int. Harvester*, 101 Minn. 263, 118 Am. St. 626.

LEVEES: 25 *Cyc.* 188-205.

LEVETT'S CASE (1868), *Cro. Car.* 538, *Beale, Crim. Cas.* 65; note, *R. v. Wheatley*; 1 *Lead. C. C. (B. & H.)*, 1 *Bish. C. L.* 303a, 2 *Crim. Def.* 263, 324.

Cited, p. 26, *Hughes' Proc.*

Levett stated: Ignorantia facti excusat.

Levett was awakened to defend his house against supposed burglars. But the facts were that the servant had company, whom

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she concealed in the buttry, that Levett might not know she was there. His wife found her in the buttry and called to her husband, L., and pointed to the company of the servant as the burglar. L. was armed with a sword and with it inflicted mortal wounds upon the woman concealed in the buttry, believing her to be a burglar. *Held*, L. was not guilty of murder.

See R. v. Lynch (1848), 1 Cox, C. C. 361; McGehee v. S. (1885), 62 Miss. 772, 52 Am. Rep. 209; 8 Rul. Cas. 29. *Ignorantia facti excusat*. S. v. Yanz (1901), 74 Conn. 177, 92 Am. St. 205-220, n. (husband killing a supposed adulterer of wife). *Actus non facit reum nisi mens sit rea*: There must be act and intent to constitute crime. The act is essential and must be entered on. S. v. Hurley, 79 Vt. 28, 118 Am. St. 934. Intent not essential in statutory crimes. P. v. Roby; R. v. Prince.

LEVY; SEIZURE OF PROPERTY: What property subject to. *Ald. Jud. Writs*, 147-157; *Freem.*; *Herm. Executions*. Of property upon the person. *Green*: 90. Right to break and enter doors. *Semayne's Case*.

LEWDNESS; WHEN A CRIME: 25 Cyc. 209-222; McClain, C. L. 1109, 1110, 1130-1132, 9 Am. Cr. Rep. 364.

LEX EST MISERA UBI JUS EST VAGUM aut incertum: It is a miserable state of things when the law is vague and uncertain. 1 Kent, 520; § 50, *Hughes' Conts.*; *Mellus est jus*, etc.; *Nihil in lege intolerabilus*; *Nihil infra regnum*, etc.; *Ubi jus incertum*, etc.; *Le ley est le plus haut*, etc.; *Legis fignendi*, etc.; *Res est misera*; *ILLINOIS*; *MISSOURI*; *Jus nec in-flecti*, etc.; *Harvey*: 123; *Piper*: 114. *Cited*, §§ 21, 71, 122, 146, 188, *Hughes' Proc.*

LEX NEMINEM COGIT AD VANA seu inutilia peragenda: The law forces no one to do vain and fruitless things. *Bro. Max*. 252; 2 Langd. *Conts.* 1083; *Virginia Coupon Cases*: 285a. Vain things not required. *Lex nil facit*, etc.; *Lex non precipit*, etc.; *Natura non facit*; *Frustra probatur*, etc. C. v. Temple (1859), 14 Gray, 69; *Street R. R.* (1886), 102 N. Y. 343; *High Ex. Rem.*, § 14; *Trustees*, 3 Johns. 566; *Manhattan*, 44 O. St. 156, *Suth. Stat.* 331; *Case v. Beauregard* (1879), 101 U. S. 686. *See* FRAUDULENT CONVEYANCES, where one must sue an insolvent and have execution returned *nulla bona*, to prove insolvency, however palpable that fact. *Harrigan v. Gilchrist*, *sub* *Magna Charta*. *Lex est ratio*; *Summa*, etc.

Cited, §§ 13, 26, 58, 133, 140, 145, 174, 257, 285, 323, 324, *Hughes' Proc.*

A cause of action need not be repeated. *Sturges*: 111. Matter showing a defect need not be again set forth in a plea; a demurrer or motion is then available. 97 Tex. 124, 104 Am. St. 857. Further proof of what is clear is surplusage.

A demand for property tortiously taken is unnecessary in replevin. *Rosum*, 1 So. Dak. 308, 9 L. R. A. 817, n. *Wells*, *Replev.* 309, *Cobby*, *Replev.* 467. *See* cases *sub* REPUGNANCY. A needless demand need not be made before an application for *mandamus*. S. v. *Spokane*, etc. R. R. (1898), 19 Wash. 518, 67 Am. St. 739, n. Refusal to hear a party revokes the summons. *Windsor*: 1. Exceptions to *coram non judice* proceedings useless. *Shutte*: 291. Or to entry of a judgment on a verdict in federal courts, and, by

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some decisions, in Colorado. *Legere*, 17 Colo. Ap. 472. It is a vain and useless step to except to overruling a motion for a new trial, or to entry of judgment in any case.

Where tender or demand would be wholly unavailing neither need be made. *Hawley*, 53 N. Y. 114; *Parker*, 43 N. J. L. 512, 517; *Grove*, 15 Pa. 128, 2 *Benj. Sales*, 859. A tender is not required in specific performance actions, if useless. 2 *Beach*, Eq. 589.

A full appearance dispenses with a summons and all that relates to it. *Pennoyer*: 58: cases (this rule does not apply to infants); *McCormick*, 40 N. Y. 303. *See* ABATEMENT: cases. Courts will never sanction a practice which imposes an impossible or even an unreasonable requirement upon litigants. *Ditch Co.*, 22 Colo. 513, 524. Notice is not required when it can be of no avail. *Bickerdike*; *Lent*, *sub* GUARANTY.

Conditions precedent to suing. Parties may contract that a third person, a referee, an arbitrator or architect, must be satisfied and shall make estimates and measurements, and find and certify to amounts or damages, and, ordinarily, such a requirement is a condition precedent to the vesting of the right to sue. No wrong is committed until such condition is complied with as stipulated for.

Scott v. Avery (1855), 8 Exch. 497, 5 Ho. Lds. Cas. 811; *Williston*, C. *Conts.* 195; *cited*, 2 *Pars. Conts.*, 2 *Chit.* 1183, *Beach*, *Conts.*, *Gr. Pub. Pol.* 471: cases; *Williams*, 112 Mo. 463, 34 Am. St. 403-430, n., 3 *Suth. Dam.* 808 (contract methods for ascertainment of damages); *Royal*, 192 U. S. 162. *See* *Frost*: 308a.

Now, if a contracting party were to deny that any amount or damage was for consideration whatever, then the condition is dispensed with, and one may sue immediately. To wait for compliance is a vain and fruitless thing. 2 *Chit. Conts.* 1184 (11th Am. ed.); *Frost*: 308a; *Allen*, 103 Cal. 85, 42 Am. St. 99 (attorney must pass on title, if stipulated for); *Hennessey*, 152 Ill. 505, 43 Am. St. 267, n., *Gr. Pub. Pol.* 471: cases; *Baltimore R. R.*, 56 O. St. 224, 60 Am. St. 745.

Renunciation of contract before time for performance gives immediate right to sue. *Hochster*. One cannot cause the breach of a contract and then complain of it. *Nullus commodum*, etc.

When all in interest appear and waive notice it is then vain and fruitless to give it. *Thomas v. Citizens' Bank*; *Pennoyer*: 58.

The absurd, the impossible and the vain and useless thing is never required in law. 66 Cent. L. J. 349-352; *Case*, 101 U. S. 686.

Compliance with vain and useless requirements need not be alleged. *See* CREDITOR'S BILLS; *O'Brien v. Stanebach* (1897), 101 Ia. 40, 63 Am. St. 368.

The underwriters cannot plead a defence upon the merits and at the same time insist that the assured has not made a proper demand, or has not made a technical proof of loss called for in the policy. *See*, however, *Summerfield*, 64 Fed. 292.

One cannot allege no liability but at the same time admit possible liability if some preliminary or technical step had been complied with. *Allegans contraria*.

To speed causes to a disposition upon their merits is one of the conserving principles of procedure. § 103, *Gr. & Rud. Interest reipublicæ ut sit finis litium*.

LEX NEMINI FACIT INJURIAM: The law does wrong to no one. Branch, Princ. *Cursus curiæ*.

LEX NON COGIT AD IMPOSSIBILIA: The law will not require an impossibility. Bro. Max. 242, 268; 2 Sto. Eq. 1301-1307. Bloom: 266; Bailey v. DeCrespigny; Taylor: 310; Frost: 308a; Hochster: 308b. Suth. Dam. 37, 655, 709, 710. § 26, Hughes' Proc.

Peck v. U. S. (1880), 102 U. S. 64, 28 L. ed. 46, n. 3 Page, Conts. 1218, 1446; Woodberry v. Warner (1890), 53 Ark. 488, Huff. & W. Conts. 574; Whart. 296-331; Hughes' Conts. 70. *Nullus commodum capere*, etc. See ABSURDITY.

Peck stated: P. contracted to supply a government post with hay, but he was so tardy that the government officials became alarmed as the crop was limited to a certain acreage, which alone must be looked to for a supply. Accordingly, the officials proceeded to cut all grass from which hay could be obtained, and Peck was therefore unable to fill his contract. Upon this ground he brought suit, and recovered.

One contracting to do things, which afterwards became impossible, must pay damages. Chicago R. R., 149 U. S. 1, 2 Benj. Sales, 864-868; Stewart, 127 N. Y. 500, 14 L. R. A. 215-220, ext. n.; Anderson, 50 Minn. 28, 7 L. R. A. 555, n. See IMPOSSIBILITY.

LEX NON EXACTE DEFINIT, SED arbitrio boni viri permittit: The law does not define exactly, but trusts in the judgment of a good man. 1 Bl. Com. 61, 3 id. 431; 2 Kent, 448. See STATUTE; ABSURDITY. *Boni judicis; Actus curiæ neminem gravabit; Kollock; Crowns* (code cases); *Cujus est instituere; Ad ea quæ frequentius; Divinatio non interpretatio est, quæ omnino; Expressio eorum; Verba intentione; Verba nihil operari.*

Cited, §§ 13, 28, 29, 40, 42, 43, 52, 160, 204, Hughes' Proc.; §§ 13, 38, 80, 87, 140, 159, 262, 297, Gr. & Rud.

LEADING CASES: *S. v. Sheppard* (Mo.); *Church v. U. S.*; *Russell v. Sharp* (1905), 192 Mo. 270, 111 Am. St. 496-511; *Galbraith*.

See CONSTRUCTION: cases; *Brown v. Tharpe*; *Quinn v. P.*; *S. v. Bolden*: 216; *St. Louis Beef Co.*

There are prominent writers in America who claim that the above maxim is obsolete. Suth. Stat. (Lewis ed.), 587, 588 (equity of construction). See EQUITY. Against it these authors offer *Ita lex scripta est*; that there can be no intent not expressed in the words. Lewis, Suth. Stat. 388. It is claimed this is the modern and well approved rule. See EQUITY; MAXIMS. But the footing of *Lex non exacte* rests on cases and reasons that are not cited or taken into account by the strict constructionists who build in the marsh and not on bed rock. *Evans v. Johnson*. See pp. 8-33, §§ 5b, 28, Hughes' Proc.; *S. v. Bolden*: 216; *Indianapolis R. R.*: 223; *Oakley*: 222; *Bates*: 225; *End. Stat.* 182. See CONSTRUCTION; 40 Wis. 202 (aggression of federal courts).

Election frauds; injunction to restrain. *P. v. Tool*, 35 Colo. 225, 17 Am. St. 198-215.

Elsewhere we have likened American law to the marsh which the Rhine has made for itself (Preface, DATUM POSTS). With the formation of American constitutions existed a powerful sentiment which was often

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advanced by political parties, which have always been notable conservative sentiments; they, like Coke and Blackstone, believe the law is local or provincial; that each jurisdiction may have a procedure unlike all others; that there may be a due process of law for each state or province, one for the federal courts and a different one for each tribe or rivulet. Paralso; *Breeze v. Haley* (Colo.), Hughes' Proc.; Winona. They believe that each state may declare its own peculiar *res adjudicata* to conclude the citizen, but not make rules of procedure binding the federal courts. It is such shifting views that constitute the marsh referred to; its sands and silt are the foundations of the bulwarks of American jurisprudence, which is like the house of the parable, built on the sand. Upon this sand rest long lines of unwieldy digests and cyclopedias, and endless bulks of case law. See LITERATURE.

Courts have unwisely assumed that a convention could come together and declare a few principles which would be complete in themselves for the operation of the due administration of justice; and they have construed accordingly and so strictly according to *Ita lex scripta est* that nothing less than wildernesses of confusion beset the student. See Preface, Gr. & Rud., Vol. I. On the one hand the student is taught that if a statute is constitutional it must be enforced, however blasphemous, immoral and unchristian it may be; on the other hand that fundamental principles are annexed by interpretation. *Brown v. Tharpe* supports the former view; *Church of the Holy Trinity v. U. S.*, the latter view. See also, *Oakley*: 222; *Indianapolis*: 223; *Rison*: 253; *Blair*: 254.

They have denied the maxim, *Casus omissus et oblivioni datus dispositioni communis juris relinquitur*: A case omitted and forgotten is left to the disposal of the common law.

There are courts that hold that the heir may murder his ancestor and succeed to the decedent's estate (*Riggs v. Palmer*: cases); that one may take advantage of his own wrong (*Nullus commodum*); that the vitals of a contract, namely, *Ex nudo*, etc., and *Non hæc in fœdera*

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veni are at the mercy of legislation; also that the principle, *Volenti non fit injuria*, also *Consensus tollit errorem* and *Interest reipublicæ ut sit finis litium* can be abolished; that the elements of a cause of action can be created by statute. *Scott v. McNeal*.

The law is and ever must be, that the words of any compact may be departed from only to vindicate the grounds and rudiments, the fundamentals—the primal covenants of society. *Galbraith; In præsentia majoris*; *S. v. Bolden*: 216.

Those who would construe acceptably to lawyers and statesmen must study and be familiar with the grounds and rudiments of law, its first principles. §§ 45-123, Gr. & Rud.

A resolution that general words should not be restrained or limited by particular words and expressions would be void. *Verba generalia restringuntur* is a part of the prescriptive constitution. The canons of construction from the civil law cannot be abrogated without impairing the supreme law of the land.

If a construction consistent with the letter can be given that accords with fundamental law, then *Ita lex scripta est* should be applied; but no construction should be given any document in violation of first principles. To illustrate, if a statute provided for giving a judgment against one and made no provision for giving notice, nevertheless such a statute should be construed to include the giving of notice; words denying notice should be set aside. *Audi alteram partem; Concordare*.

Writers on construction and on procedure write these subjects from all kinds of matter, with a preference for late cases, which are all things to all men. *See ILLINOIS*. The directors of great political conventions of 1908 would have done well to retain an editorial staff of "gum shoe" compilers; these could have filled platforms with injunction planks that would "keep the word of promise to the ear." Law books can be written like party platforms, from the "late cases."

Codes and practice acts should be liberally construed and made consistent with fundamental law. §§ 134-169, Gr. & Rud. Construction of procedure should be from views of estoppel and of collateral attack. These arise from the prescriptive

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constitution. §§ 170-261, Gr. & Rud.; *End. Stat. 182*. Construction of codes and practice acts must be from the conserving principles of procedure. §§ 83-123, Gr. & Rud. *See Quod ab initio non valet*.

Procedure must be viewed from the prescriptive constitution (*End. Stat. 182; Indianapolis: 223*); from these maxims: *De non apparentibus et non existentibus eadem est ratio* (where the court cannot take judicial notice of a fact, it is the same as if the fact had not existed); *Frustra probatur quod probatum non relevat* (it is vain to prove that which if proved would not aid the matter in question); *Verba fortius accipiuntur contra proferentem* (every presumption is against the composer); *Regula pro lege si deficit lex* (in default of the law, the maxim rules). *See* maxims and cases of *RES ADJUDICATA*, also *COLLATERAL ATTACK*; *L.C. 222-227, Vol. III; CODES*.

Statutes and constitutions must be construed In pari materia. "Where fundamental principles of the constitution are of equal dignity neither is to be so enforced as to nullify or substantially impair the other." *Dick v. U. S.*, 208 U. S. 340; *Concordare; Benedicta*.

Lex non exacte From many views involves the maxim, *Salus populi suprema lex*, also *Regula pro lege si deficit lex*, *Interest reipublicæ ut sit finis litium* and *Expressio unius est exclusio alterius*. *See* *PREScriptive CONSTITUTION*.

The foregoing views deserve careful attention and should be well considered. They tremendously affect all subjects of the law. *See* *CONSTRUCTION*; *L.C. 214-271*.

Titles under judicial and execution sales often depend on strict or liberal construction. *Harvey: 123*; cases; *Piper: 114; Omnia præsumuntur rite*; *U. S. v. Dorr*; § 138, *Hughes' Proc.*

Ita lex scripta est: The law is so written. *Expressio unius*; *Suth. Stat. 321-324, Lewis, Suth. Stat. 363-640, Dewey v. U. S.*; *Milligan*, quoted 190 U. S. 245; 35 *Wis. 576, 580, 583, 516; Bronson: 238; Von Hoffman: 239*; cases; *U. S. v. Tanner (1893)*, 147 U. S. 661 (a marshal is not entitled to charge travel going to serve process when taking a prisoner under sentence to the place of commitment). Costs, strict construction. 147 U. S. 676; *Hawali v. Mankichi (1903)*, 190 U. S. 248 (the only sound principle is to declare *Ita lex scripta est*, to follow and to obey); 1 *Sto. Const. 428; Lewis, Suth. Stat. 388; Dewey v. U. S.*; *Casus omissus*; *Hahl: 1 Bl. Com. 91, 160, 186; 1 Kent, 448; Lonstorf*; §§ 19, 43, 67, 204, 291, 351, *Hughes' Proc.*

Cited, §§ 5, 5a, 9, 13, 28, 46-50, *Hughes' Proc.*; §§ 33, 77, 80, 152, 263, 297, Gr. & Rud.

Ita lex, etc., on the one hand and *Lex non exacte*, etc., on the other, greatly enlarge legal discussions, and especially all that relates to construction. Still the ra-

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tionale involved is brief, and amounts to no more than this: that wherever the supreme law—the conserving principles of procedure—the due administration of justice—is involved, either liberal or strict construction will be resorted to, as will be most conducive to the establishment and maintenance of a constitutionalism, and its requirements of *coram judice* proceedings, or due process of law. From these requirements as a high and central viewpoint, conclusions are most easily reached as to whether a matter is mandatory or directory. See *Audi alteram partem*; *De minimis non curat lex*. From such a view great confusion and discouraging bewilderment in sets of reports and great treatises are discernible. It is with them as with Blackstone—they may be cited either way. The gloss of commentators makes it appear one way in one section and the opposite in the next. Now the fact is, all the maxims above cited have a footing and are entitled to it, but their application depends on intelligence and right judgment of the subject-matter. See CONSTRUCTION; CONSTITUTIONAL LAW; CODES.

Lex non exacte, or the equity of a statute, is obsolete. Lewis, *Suth. Stat.* 587, 588 *Contra*, *id.*, 347, 489, 490 (323, 324); 64 *Cent. Law Jour.* (exposition of). In *Dewey* all of the judges could not agree that the rule was obsolete where no paramount matter or high policy was involved. The cases show that the above rules are as unsettled as is the law of the mandatory record, the status of pleadings, and the rule in *Dovaston*: 217 (every presumption is against a pleader), and of *stare decisis*. In this connection should be considered the truly great but obscured maxims, *Cujus est instituire ejus est abrogare*, and *Legis interpretatio legis vim obtinet*; also how the same court will apply *Ita lex*, etc., and at the same time substitute the statutory record for the mandatory, and will find any one of several kinds of matter for the foundation of a judgment. Such construction gives to a court the means of arbitrary power. This may be done by enlarging or diminishing the meaning of a maxim. Inclination to adopt New York cases as a model is met with the truly liberal case of *Oakley*: 222 on the one hand and the ruinously strict case of *Hahl* on the other.

One jurisprudence can be written from the theory of *Ita lex*, and another from *Lex non exacte*. Further to illustrate, it is observed, that as many jurisprudences can be introduced and discussed as there are kinds of matter for the foundation of a judgment and sequestrating orders. Elsewhere several kinds of matter are enumerated. As it is with procedure, so it is with construction. See CONSTRUCTION. The consequences of hazy views relating to the sources of confusion appear in the vast discussions of *Cumber*: 311; *Crepps*: 113 (*Omnia præsumuntur rite*, etc.), and what is involved in *De non apparentibus*, etc., and particularly that part of it in *Dovaston*: 217 (Every presumption is against a pleader). Repeating, different jurisprudences can be written from these varying and changeful

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standpoints. Accordingly appears the influence of construction; upon it depends the backbone and vertebrae of the law. See INTRODUCTION, Hughes' Proc.

The leading subjects of the law may be written first from the maxims and old cases, next from the decisions of able and great courts, arranged in groups, from book to book, and sometimes from case to case, or worse yet, where they make more than one decision relating to a matter. Each phase of the discussion tends to leave the reader in strained expectancy for the last and latest, with the idea that it is finally to clear the conditions.

Illustrations of the application of *Ita lex*, etc., appear in cases relating to costs, the general rule being that the right to fees depends upon a statute which is strictly construed. See COSTS; EXTORTION; American Steamship; Dewey. See also TAXATION; PUBLICATION; Ricketson: 59.

But there are other subject-matters that are liberally construed. Elsewhere these are mentioned. See *De minimis*; *Cujus est instituire*; *Expressio unius*; *Expressio eorum*; Thomas v. Citizens' R. R. *Stability of procedure essential for a remedy*. See PROCEDURE; STABILITY OF LAW; Taylor: 219a; *Suth. Stat.* 5; Milligan; *STARE DECISIS*.

Directory and mandatory statutes. *Suth. Stat.* 610-641; Indianapolis R. R.: 223; *Judicandum est legibus non exemplis*; *Nulle règle*, etc.; *Non est regula*, etc.; *Lex est misera*, etc.; *Expressio unius*, etc.; STATUTES.

Reason, morals and common right control statutes. *Oakley*: 222; 1 Kent, 448: cases; *Regula pro lege, si deficit lex*.

Lex non exacte is cited in relation to the following subjects: *Actus curiæ*; *Acquitas*; Beard; *Boni*; *Bonum judex*; Brown v. Tharpe; *Casus omisus*; Church; CODES; *Concordare*; CONSTITUTIONALISM; CONSTITUTIONAL LAW; CONSTRUCTION; *Cujus*; DENIAL; DUE PROCESS OF LAW; Ellis v. U. S.; EQUITY; *Expressio eorum*; GOVERNMENT; GROUNDS AND RUDIMENTS; *Lex neminem cogit ad vana*; Haddock; INJUNCTIONS; *In præsentia*; JEOFAIL; Kollock; Trist: 214; *Oakley*: 222; L.C. 214-226; Quinn v. P.; S. *ex rel.* Henson v. Sheppard.

In *U. S. v. Standard Oil Co. of Indiana* the trial judge looked after and considered the real party in interest in determining a fine of \$29,240,000 imposed upon what he found was a dummy defendant. *Baerman*: 48. See *Melius*; *Interest reipublicæ*. But his views were not acceptable to the court of errors, which is reported to have said that those interested in and managing and directing the litigation should not be concluded thereby. The court of errors contended for *Concordare leges legibus est optimus interpretandi modus*, as may be judged by this language:

Condemned Without Hearing.—"Briefly stated, the reason of the trial court for imposing this sentence was because, after conviction and before sentence, it was brought out on an examination of some of the officers and stockholders of the Standard Oil Company of New Jersey that the capital stock of the Standard Oil Company of Indiana, the defendant before the court, was principally owned by the New Jersey corporation, a corporation not before the court—the trial court

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adding (upon no evidence, however, to be found in the record and upon no information specifically referred to) that in concessions of the character for which the defendant before the court had been indicted, tried and convicted, the New Jersey corporation was not a 'virgin' offender.

"Is a sentence such as this, based on reasoning such as that, sound? Passing over the fact that no word of evidence or other information supporting the trial court's comment is to be found in the record, would the comment, if duly proven, justify a sentence such as this—one that otherwise would not have been imposed?"

"Can a court, without abuse of judicial discretion, wipe out all the property of the defendant before the court and all the assets to which its creditors look in an effort to reach and punish a party that is not before the court—a party that has not been convicted, has not been tried, has not been indicted even? Can an American judge, without abuse of judicial discretion, condemn any one who has not had his day in court?"

"That, to our mind, is strange doctrine in Anglo-Saxon jurisprudence. No monarch, no parliament, no tribunal of western Europe, for centuries, has pretended to have the right to punish except after due trial under all the forms of the law. Can that rightfully be done here, on no other basis than the judge's personal belief that the party marked by him for punishment deserves punishment? If so, it is because the man who happens to be the judge is above the law.

Elkins Act Not Only Law.—"Counsel for the government say, in concluding their brief, that the Elkins act was passed because the peace of society and the welfare of the people demanded it; that railroad inequality means business ruin to all except those powerful enough to make themselves the beneficiaries of the discriminations; means the wiping out of an industry, of a town, of a city, at the command of an officer of a private corporation; that railroad inequality is the basis of monopoly and the wrongful concentration of wealth; that no law of more vital importance was ever passed by congress; and that those guilty of violating it are guilty of a serious crime against the principles of industrial freedom and equality.

"Every sentence of that arraignment is true. That this court recognizes the importance of the enforcement of that act is shown in its affirmation of penalties that under other circumstances would be regarded as severe.

"But the interstate commerce act, important as that law is, is not the only law under which we live. We live under a guaranty that reaches back to the beginnings of our law and is securely planted in every constitution of civilized government, that no one shall be punished until he has been heard; and above this fundamental guaranty there can be set no higher prerogative; for let it once come to pass that under the stress of enforcing commercial equality any power in the government may override the fundamental human right of being judged only after having been duly tried—a right just as essential to men in the associated relationship of the corporations, as to men in the relationship of copartners, or to men individually—there will remain no commerce worth the name to safeguard. The

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beginning of commerce is constitutional government and the foundation of constitutional government is the faith that every guaranty of our institutions, no matter what the provocation, will be sacredly observed.

"The judgment of the District Court is reversed and the case remanded with instructions to grant a new trial and proceed further in accordance with this opinion."

The real party in interest directing, controlling and managing litigation may be shown by oral evidence. For imposing sentence such inquiry might not appear in the record. *Bauerman*: 48.

This case illustrates the truth in the maxim *Cujus est instituire ejus est abrogare*. § 151, Gr. & Rud.

Creating a juridical establishment and investing it with the duty of enforcing the supreme law of the land and with conserving the due administration of the laws carries with these duties vast implications. In the exercise of these powers, courts will disregard statutory provisions that tend to create hostile systems of procedure and to encumber the enforcement of the law. *See VARIANCE*. Whatever relates to these matters will be broadly and liberally pursued for the public welfare and the vindication of the conserving principles of procedure. For these ends liberal construction is demanded. The letter of a statute may be departed from, if thereby fundamental principles are vindicated and the harmony and consistency of the law is advanced. *End. Stat. 182; S. v. Bolden: 216; cases; Oakley: 222; cases; Indianapolis: 223. § 85, Gr. & Rud. See THEORY; VARIANCE; Verba fortius.*

Fundamental law overrides the establishments of men; the will of men must be made to conform to fundamental law. If men come together and resolve on nothing more than the Declaration of American Independence and the Preamble to the Constitution of the United States, from these constructive statesmen and jurists could direct all that is necessary below. The assumption that all law, or all fundamental law, can be found in black upon white and called constitutional law is not sustained by the decisions of American courts. For a government a bank was given by construction. *M'Culloch: 47*. For fundamental law the letter yields. *S. v. Bolden: 216; §§ 83-123, Gr. & Rud.*

American judges are taught that there is no unwritten constitution

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rather than that there is one. As a result they admire and try to follow the Theory of the Case and other new fangled ideas. New statutes always make a commotion, *e. g.*, the Statute of Frauds and of limitations and codes and practice acts. In a general way it may be said that a new statute does not bind a court; Courts respect or emasculate statutes just as suits their whim and caprice. They set aside or nullify just as they please. This is illustrated in *The Income Tax Cases*, also the *Standard Oil Case* (1908). The imperial commands of codes are abrogated. It has been said that laws are like spider webs; they catch the little flies but let the big ones break through. Many decisions show the importance of construction. § 151, Gr. & Rud.; 67 Cent. L. J. 61.

The condition in states where it has been attempted to partition appellate jurisdiction among intermediate courts, as in New York, Indiana, Missouri, Illinois and Colorado, shows that American statesmanship is not guided by fundamental principles. There can be but one supreme court in a well ordered state. It can be organized of enough branches to discharge judicial duties promptly and without delay. Waco: 300. A supreme court is necessary to vindicate procedure and the leading branches of the law. New statutes can be construed and settled only by a supreme court, and in accord with fundamental law—the prescriptive constitution.

The grounds and rudiments of government expand and contract written constitutions, as was extremely illustrated in Colorado during the establishment of martial law in parts of that state in 1904. Pettibone. Those in authority profanely referred to the constitution when protection was asked under it, its required forms and ceremonies were set aside and disregarded with a high and armed military establishment. *Silent leges inter arma*. Accused persons were given no more attention in Colorado than they were during the reign of terror in France—no more than is given in an absolutism. Accused persons by armed soldiers were forced into cars and train loads were deported into deserts in western Kansas and there

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unloaded. The expediency of absolute government in that state has met with no defense, other than the plea of necessity. Whoever advances that plea commits himself to the maintenance of the higher law. If written constitutions may be disregarded in one relation so they may in another. In Colorado not the written constitution alone is the sole law of that state. Pettibone.

In England the leading subjects of the law and their related branches arise from the principles of the prescriptive constitution. Now, if crime, tort, contract, equity and procedure are the same in American states as they are in England, then it follows that these subjects spring from the same parent source in all countries alike. Therefore, so far as regards those subjects, at least, there must be for them a prescriptive constitution in American states.

Statutes often interdict contracts to effectuate certain policies; *e. g.*, foreign corporations are forbidden to contract before they have filed certain papers and made of public record required establishments. Contracts made by such corporations are not held absolutely void, but merely in abeyance until the required papers are filed. Kirven. *See CORPORATIONS*. If a penalty is prescribed for making a prohibited contract, then the contract is valid, but the penalty may be enforced. A contract of required assent and lawful consideration is favored by courts; such contracts will be upheld if possible. *Bartlett v. Viner*; *Holman*: 363. A contract declared void by statute is nevertheless upheld in the hands of a *bona fide* purchaser. *Swift v. Tyson*. Courts will, if possible, protect a *bona fide* purchaser. Fundamental principles are always a factor of the law and are silently imported by construction. *S. v. Bolden*: 216: cases; *Lex non exacte*.

Statutes often limit the amount a bank may loan to any one customer; but a violation of this provision does not invalidate the loan made in violation of that provision. For making such loans the bank is amenable to an accounting with the state. The doctrine of *ultra vires* has a very limited place where a corporation receives a benefit and appropriates it. *Hitchcock v. Galveston*. In all such

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relations courts are guided by an equitable construction. One is not allowed to take advantage of his own wrong. This is a fundamental maxim that is a part of the prescriptive constitution, which courts always respect and vindicate. *Lex non exacte.*

These cases are important in constitutional law, in statutory construction, in equity, in procedure (pleading, evidence and practice), in contract and its construction, in fraud and in real estate; they illustrate the maxims cited; they relate to the specific performance of oral contracts for the sale of real estate, where there is part performance of the contract. To illustrate: If a vendor orally contracts for realty, and afterwards and in pursuance of the contract the vendee takes exclusive, notorious, unequivocal and continuous possession of the land in question and exercises acts of ownership over it, all of which are referable to the contract, and these facts are proven, then the court will from this circumstantial evidence presume a contract (*Res ipsa loquitur*), and will then inquire after the contract. 2 Sto. Eq. 764; Lester: 341. In this class of cases the vendee cannot take advantage of his own wrong, nor shield himself under a technical defect of evidence showing him guilty of fraud. For right and justice, for a vindication of fundamental principles, circumstantial evidence is resorted to, is relied upon and is paid the greatest respect by courts of chancery. Circumstantial evidence is indispensable in the due administration of justice. Hickory: 194; Spies v. P.

One is presumed to intend the natural, direct and probable consequences of his act. Scott (Squib Case).

By circumlocutory proofs the oral contract is established in contravention of a direct and positive prohibition of the statute of frauds, which requires a memorandum evidencing the sale of realty. Lester: 341; Wain: 335.

The law is a spirit; it is more than ink on paper. To illustrate: The American student is taught that a constitution is imperial and invincible over all other laws; and next, that the power of Parliament is omnipotent, if only its edicts are con-

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stitutional; also that a statute is the law, however immoral, unchristian and blasphemous it may be. Brown v. Tharpe; Rison: 253; Blair: 254. But it is well to observe that along with this teaching is to be considered *Trist*: 214, and following cases. In *Oakley*: 222, it will be seen that even constitutions yield to the unwritten constitution. Church v. U. S. In these cases the letter was departed from and fundamental law was enthroned; it was declared supreme. Hughes' Proc., § 204.

The maxims, that "Fraud vitiates all into which it enters" (*Ex dolo malo non oritur actio*) and "No man shall take advantage of his own wrong" (*Nullus commodum capere potest de injuria sua propria*) are grounds and rudiments of law (§§ 70-71, Vol. 1). Notwithstanding the teaching referred to, these maxims override statutes and constitutions. In their applications are illustrations of the existence of the prescriptive constitution.

The foregoing is well illustrated in the equitable exceptions to the statute of frauds. Lester: 341. In these cases the plain and unequivocal language of statutes is set aside from the operation of the maxims last cited, in all states except in Kentucky, Mississippi, North Carolina and Tennessee. McGuire v. Stevens, 42 Miss. 724, 2 Am. Rep. 649 (this court is bound by the statute; it makes no exceptions and this court will make none).

It is not presumed the owner of land would allow a trespasser to take possession and occupy it, and make valuable improvements on it, in the owner's lifetime, without some protest or objection from the owner. *Allegans contraria non est audiendus*. Nor will it be presumed that the occupant did all of these acts as a trespasser and without right. Fraud—evil—is never presumed. *Malum non presumitur*.

The foregoing illustration is given to show how constitutions and statutes yield to fundamental law; how the letter yields to the spirit and how the maxims cited lead and direct; that the maxims are the prescriptive constitution and will be respected against positive enactments. Parliament is omnipotent, but its acts are measured by fundamental

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law in England. See CONSTRUCTION. And this is not less true in America. The maxim, the prescriptive constitution, rules in both countries. In *presentia majoris cessat potentia minoris*; *Lex non exacte*, etc.

LEX NON VETAT PERMITTIT: What the law does not prohibit it permits. Petition. § 163, Gr. & Rud. See *Quod lex*; INDICTMENTS.

LEX VIGILANTIBUS NON DORMIENTIBUS SUBVENIT: Law assists the wakeful, not the sleeping. *Vigilantibus*.

LIBEL AND SLANDER: See DEFAMATION; Suth. Dam.; L. C. sub Pollard; 2 Bouv. Dic. 204-215; And. Dic.; 2 Gr. Ev. 410-429, 3 *id.* 164-179; 2 Bish. Cr. Proc. 781-811; Harrison v. Bush; 5 Mews' E. C. L. 532-675 (Defamation). § 313, Gr. & Rud.; 25 Cyc. 225-589.

Criminal libel. C. v. Selfridge: cases; C. v. Clap. The crime of. McClain, C. L. 1040-1049; 25 Cyc. 567-589; 10 Am. Cr. Rep. 448. In pleadings. See DEFAMATION; LIBERTY OF THE PRESS. Privileged statements. Harrison v. Bush. Publishing one as a common liar is. Parton, 31 Mont. 195, 78 P. 215, 107 Am. St. 417n.

LIBERTY: See FREEDOM; CIVIL LIBERTY. 2 Bouv. Dic. 217-221; 25 Cyc. 590; And. Dic. The price of liberty is eternal vigilance, liberty is for the intelligent. See MAXIMS.

LIBERTY OF THE PRESS: There is no right to publish everything simply because it is true. S. v. McKee, 73 Conn. 18, 84 Am. St. 124n. (restrictions for public morals); Bouv. Dic.; Cool. Const. Lim. *Eum qui nocentem*.

Liberty of speech and of writing; abuse of, cannot be enjoined. There are injuries for which legal remedies are inadequate that equity will not enjoin. Marks, 168 Mo. 133, 90 Am. St. 449; Harrison v. Bush. See BOYCOTT.

Liberty of speech and of writing is secured by the constitution, and incident thereto is the correlative of silence, not less important nor less sacred. See Pavesich, sub PRIVACY, 94 Ga. 732.

Immunity of judicial officers from adverse criticism after a case is ended, and the parties are dismissed *sine die*. Right to amplify jurisdiction claimed. S. v. Sheppard (Mo.). See CONTEMPT; Hale v. S.; Burdett v. C., 103 Va. 838, 68 L. R. A. 251-264, n.

Legislatures cannot authorize defamation. Hanson v. Krehbiel.

LICENSE: For occupation; privilege, 25 Cyc. 593-640.

To real property. 25 Cyc. 640-653.

LICKBROW v. MASON: L. C. 394.

LIEN: 25 Cyc. 655-686. *Lien of judgments*; estates and interests affected by. *Filley v. Duncan* (1867), 1 Neb. 134, 93 Am. Dec. 337-358, ext. n.; 2 Freem. Judg. 338-406. Is *stricti juris* and is just what the statute makes it. Ruth, 13 S. Dak. 482, 79 Am. St. 902. Of attorneys. 4 Cyc. 1005-1023.

Attachment liens; origin and general nature. Franklin Bank v. Bacheider (1843), 23 Me. 60, 39 Am. Dec. 601-611, ext. n. Homesteads; judgment liens against. *Vanstory v. Thornton* (1893), 112 N. C. 196, 34 Am. St. 483-506, ext. n. Liens in United States courts. Seller's Lessee v. Corwin (1832), 5 Ohio, 398, 24 Am. Dec. 301-314; Ward v. Chamberlain (1862), 2 Black (U. S.), 430; cases, 17 L. R. A. 319; Blair v. Ostrander (1899),

Lien.

109 Ia. 204, 77 Am. St. 532, n., 47 L. R. A. 464-480 (states cannot affect). *Execution liens*. 2 Freem. Ex. 195-207. *Of auctioneer*. Ans. Conts. 346. *Of factor*. Ans. Conts. 346, 358.

Landlord and tenant. Kaufman, 83 Ark. 118, 119 Am. St. 121-131, ext. n.

Maritime liens. Chamberlain, 66 C. C. A. 555, 133 Fed. 725, 70 L. R. A. 353-439, ext. n.; 28 Cyc. 748-817.

One may defeat his lien by his own wrong. Kortright v. Kady: cases.

See Bouv. Dic. 226-240, And. Dic.; Mews' E. C. L. 1625-1652.

LIGHT AND AIR: Rights to. 1 Cyc. 786-789.

See MALICIOUS ACTS; Sic utere tuo.

LIMITATIONS OF ACTIONS: MAXIMS: LEADING CASES. *Vigilantibus et non dormientibus*, etc.; *Salus populi suprema lex*; *Interest reipublice*, etc.; *Nullum tempus occurrit regi*.

Calling v. Skoulding (mutual, open and account current); **Whitcomb v. Whiting** (co-contractors; payment by one; effect); **Bell v. Morrison**; **Tanner v. Smart** (new promise); **Trueman v. Fenton** (barred debt will support a new promise); **Bonomi v. Backhouse**; **Pearsall v. Smith** (fraud, concealment of right to sue); **Castro v. Gell** (recording a deed bars action when); **Aiston v. Hawkins** (presumptions from time); **Vaughn v. Congdon** (a crime must be prosecuted aptly); **Rhodes v. Smethurst** (when the statute begins to run it continues); **Taylor d. Atkyns v. Horde**; **Nepean v. Doe d. Knight** (adverse possessions); **Michoud v. Girod** (laches).

A cause of action was immortal at common law. Cowhick, 5 Wyo. 87, 63 Am. St. 17, 25 L. R. A. 608-612. Even as to crimes. *Nullum tempus occurrit regi* applied. The statute rests on *Interest reipublice*, etc., a branch of *Salus populi suprema lex*. But where there is no laches, on principle there is no bar. *Cessante ratione legis*. The statute is founded on *Vigilantibus et non dormientibus*, etc. Ans. Conts. 48, 54, 317-319; 2 Bouv. Dic. 242-259; And. Dic. 628-631; 8 Mews' E. C. L. 1-334; 25 Cyc. 786-789.

"Mutual, open and account current": meaning of. **Calling v. Skoulding** (1795), 6 Term Rep. (D. & E.) 189; **Norton v. Larco** (1866), 30 Cal. 127, 89 Am. Dec. 70-85, ext. n.; **Cottam, 4 Man. & G. 271-284** (43 E. C. L. R.), 4 Scott, N. R. 819, 16 Rul. Cas. 179.

The last item of an account will not draw after it earlier items, except where it is a "mutual, open and account current," i. e., one that each party could sue upon. Now, observe that an account between dealer and customer is not a "mutual, open and account current." Norton.

Co-contractors; partners. *Payment by one is a payment by all.* **Whitcomb v. Whiting** (1781), 2 Doug. 652, 1 Sm. L. C. 982-1026, 8th ed., 579-590, 11th ed. (reviews English cases), also in all other editions; **Smith, Conts. 530**, 3 Pars. Conts. 86, 2 Chit. Conts. 1252, 1257, Sto. Part., Pars. Part., Lind. Part., Ang. Lim., 3 Kent, 50, 25 L. R. A. 608-615, 3 Rand. Com. Paper, 1626, 1 Danl. 374, 2 Pars. N. 656, 658; **Cowhick; Maddox, 143 Mo. 613**, 65 Am. St. 678-692, ext. n. *Payment by a principal is not a payment by a surety.* **Meltzer, 12 Ind. Ap. 381**, 54 Am. St. 531, 16 Rul. Cas. 160, n.; *Res inter alios*, etc.

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New promise; sufficiency of. Bell v. Morrison (1828), 1 Pet. 351-375, Ang. Lim., 15 L. R. A. 657; 178 Mass. 417, 55 L. R. A. 320, 69 id. 262, 1 Gr. Ev., 2 id., Suth. Stat., Danl. Nego. Insts., Pars. N.; Pars. Conts., Smith, 527, Chit., Bish., 3 Page, 1647, 1675, 1689, 1694, Bro. Max. 893, Cool. Const. Lim., Pars. Part., Lind. Part.; notes, Whitcomb, 3 Kent, 51; Beeler v. Clark (1899), 90 Md. 221, 78 Am. St. 439; Pierce, 128 Cal. 473, 79 Am. St. 63, n.; Halladay, 127 Mich. 363, 89 Am. St. 478; 95 Am. St. 657.

The statute is strictly construed. Expressio unius; Pietsch, 123 Wis. 647, 102 Wis. 342, 107 Am. St. 1017.

Defense of, is favored. Bell v. Morrison. And after default it may be pleaded. 61 L. R. A. 746-756, ext. n., citing Bell; Thomas, 33 Wash. 459, 99 Am. St. 961-964 n.; Wood, 101 U. S. 135.

"Great latitude in the amendment of pleadings is conferred upon the trial court by the statute, and the appellate courts in all jurisdictions have been liberal in construing this power. It is claimed by the appellant that one of the well-defined limitations is that there must be an entire departure from the original cause of action and defense, and that it must be done in furtherance of justice. The basis of appellant's contention, and the only ground upon which it can be sustained, is that the statute of limitations is an unconscionable defense. But in accordance with the weight of authority this court has held that it is a defense which litigants have a right to plead, and that in the trial of a cause it should not be discriminated against, but should be treated as any other defense." Thomas, *supra*: contra cases.

Tanner v. Smart (1827), 6 Barn. & Cress. 603 (19 E. C. L. R.), 30 R. R. 461, 16 Rul. Cas. 160, n., 39 Am. St. 740, 2 Chit. Conts. 1142, 178 Mass. 417, 55 L. R. A. 320-323, Mews' E. C. L., 3 Rand. Com. Paper, 1613, 1616, Pars. Conts., Smith, 523, Chit., Add., 2 Pars. N. 648-660, 2 Gr. Ev. 440; Custy, 159 Mass. 245, 38 Am. St. 419, n. Part payment; new promise by; if made by the debtor it must be voluntary and be intended by him to be part payment when it is made. Wolford, 71 Minn. 77, 70 Am. St. 315, notes to Whitcomb, Sm. L. C.; Ans. Conts. 317-319.

Barred debt a consideration for promise to repay. Ans. Conts. 100; Trueman, 95 Am. St. 438; Menzel, 132 N. C. 660, 95 Am. St. 647-679, ext. n. (effect of the bar of the statute of limitations).

Effect of acknowledgment of debt to suspend running of. Note, 34 Am. St. 720; Ans. Conts. 319, n. New promise to stranger insufficient. Spangler, 122 Pa. 358, 9 Am. St. 114, n.; Ans. Conts. 319, n. Indorsement of payment on note by creditor is not *prima facie* proof of payment. 1 Gr. Ev. 121, 122; cases; Houston, 76 Tex. 368, 18 Am. St. 57, n. Justness of debt must be admitted, and also a willingness to pay it. Nelson, 92 Iowa, 356, 54 Am. St. 568, n.; Krueger, 76 Tex. 368, 7 L. R. A. 72, n.

In effect a new promise is a new contract, with all essentials of a new contract, the consideration being the old one revived.

Fraud; concealment of facts; will postpone the bar. Pearsall; Mereness, 112 Iowa, 11, 84 Am. St. 318; McMullen, 64 Kan. 298, 91 Am. St. 236, n. (surety bound by principal's fraud); Lattin, 95 Cal. 317, 29 Am. St. 115, n.; Lewey, 166 Pa. 356, 45 Am. St. 684, 28 L. R. A. 283; Mc-

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Comb, 149 U. S. 629; McCarlie, 77 Miss. 594, 78 Am. St. 540; Backhouse, *ante*. *Castro v. Geil* (1895), 110 Cal. 292, 52 Am. St. 84 (deed not recorded more than three years); Angell, Lim. 183-191; Snodgrass, 25 Ala. 161, 60 Am. Dec. 505-515, ext. n.; Kelly, 76 Me. 81; Shannon, 6 Rich. Eq. (S. C.) 96, 60 Am. Dec. 115-121, n., 3 Rand. Com. Paper, 491.

Pleading concealment is governed by the strict rule of pleading fraud, turpitude, crime, Ex dolo malo, etc. Pearsall, *supra*. The facts must be pleaded and active concealment shown, and the presumption against the pleader must be met, and excluded by the statement of facts. Ignorance and negligence appearing will defeat the bar. Vigilance, honesty, intelligence, prudence and care are exacted of men. Coggs, 350. And, accordingly, ignorance and neglect to assert one's rights operate as an abandonment, and bars one's remedy. Williams, 8 Fred. Eq. 123, 55 Am. Dec. 442; Stemmer, 58 Pa. 168, 11 Mor. Min. Rep. 437.

A cause was immortal at common law. 2 Danl. Nego. Insts. 1214. And also crimes. Nullus, etc.; 1 Crim. Law Mag. 456. Twenty years raised *prima facie* presumption of payment at common law. 1 Gr. Ev. 35 (specialty); Beekman, 19 Or. 383, 20 Am. St. 827, n., 10 L. R. A. 457, n. (judgment); *Alston v. Hawkins, infra*. But this could be rebutted. Gregory v. C. (1888), 121 Pa. 611, 6 Am. St. 804, notes, 3 Rand. Com. Paper, 1591, 2 Danl. Nego. Insts. 1214; Evans, 39 W. Va. 299, 45 Am. St. 912, 23 L. R. A. 737. Presumptions from lapse of time. *Alston, infra*. A deed is barred after twenty years. Smith, Conts. 38.

A mortgage is barred when debt is. Lord, 18 Cal. 482; 2 Jones, Mort. 1207. *Accessorium non ducit, etc.* Right to foreclose when note is barred. Kulp, 51 Kan. 341, 21 L. R. A. 550-555. Coupons not barred until bond is. 2 Danl. 1516; Clark, 20 Wall. 583.

Municipal warrants; statutes run for and against towns and villages as individuals. S. v. School Dist. (1890), 30 Neb. 520, 27 Am. St. 420, n.; Arapahoe Village, 24 Neb. 242, 8 Am. St. 202-207, n.

State sovereignty not bound by. Nullum tempus occurrit regi. The public; how affected by adverse possession. Meyer, 33 Neb. 566, 18 L. R. A. 146-151, ext. n.

Set-off may be barred unless sued upon in time. 3 Rand. Com. Paper, 1592.

Stipulation limiting time for suit on insurance policy; when begins to run. Sample, 46 S. C. 491, 47 L. R. A. 696-715. See *Modus, etc.*

Crime must be prosecuted within the statutory period. Bish. Crim. Proc. 405; Bish. Stat. Crimes, 257-267; U. S. v. Cook, 17 Wall. 168, 21 L. ed. 538. See Crim. Law Mag. 451-456, 12 Am. Law Reg. (N. S.) 162, 682-698; cases. A justice was held liable for binding over when the crime was outlawed. *Vaughn v. Congdon* (1883), 56 Vt. 111, 48 Am. Rep. 758-761; 12 Cyc. 254-259; Cool. Torts, 200, Bish. Torts, 209, 783; Jones v. S. (1860), 14 Ind. 120 (concealment will not raise the bar); R. v. Wheatley.

Payment; when presumed from lapse of time. Husky, 2 Cold. (Tenn.) 25, 88 Am. Dec. 588-591, n.; *Alston v. Hawkins* (1890), 105 N. C. 3, 18 Am. St. 874-888, ext. n.; *In re Ash's Estate* (1902), 202 Pa. 422, 90 Am. St. 658, n.

Lex fori governs. Van Voorhis; Great West. Tel., 162 U. S. 329; Townsend, 9 How. 407, 13 L. ed. 194, n.

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When the statute begins to run, it will continue. If set in motion, not even accident or impossibility will stop it. *Bro. Max.* 904; *Rhodes v. Smethurst* (1840), 6 M. & W. 351-357, 16 Rul. Cas. 146, n., 2 Gr. Ev. 439; *Piper v. Hoard* (1837), 107 N. Y. 67, 1 Am. St. 785; *Grady*, 115 N. C. 344, 44 Am. St. 461, n.; *Smilie*, 2 Pa. St. 52, 44 Am. Dec. 156-159, n.; *Kistler* (1881), 75 Ind. 177, 39 Am. Rep. 131-134, n.

Claim against an estate is barred although no representative was appointed. *Bro. Max.* 904; *Rhodes* (litigation prevented such appointment. This case illustrates severity in construction, and is obnoxious to *Cessante ratione*, etc.); *contra: Holles*, 174 O. 173, 113 Am. St. 916-952.

The statute may be suspended by implied exceptions, as when there is a suspension from paramount authority. *Braun*, 10 Wall. 219; *St. Paul R. R. v. Olson* (1902), 87 Minn. 117, 94 Am. St. 693. *Verba intentione*, etc.

When a cause can be sued, it must be, else the statute begins to run, and then nothing can stop it but a new promise. *Winchester*, 100 Ky. 531, 66 Am. St. 356 (cannot be postponed by act of plaintiff). Neither insanity nor other supervening disability will arrest its progress. *Adamson v. Smith* (1818), 2 Mills (S. C.), 269, 12 Am. Dec. 665-669, n. It cannot be suspended by a subsequent disability. *Stanley*, 162 U. S. 255.

Residence out of the state; what is. *Kerwin*, 50 Minn. 320, 36 Am. St. 645, n., 17 L. R. A. 329; *Stanley v. Stanley* (1890), 47 Ohio, 225, 21 Am. St. 806, 8 L. R. A. 333, n. Return to the state; meaning of in clause of statute. *Burrows*, 34 S. C. 165, 27 Am. St. 811, n.

Non-residents; foreign corporations cannot plead the statute. *Larson*, 86 Wis. 281, 39 Am. St. 893, n.; *McCann*, 147 Mass. 81, 9 Am. St. 606.

Notice to municipal corporations of injury may be required before suit brought. *Barrett*, 129 Ala. 179, 87 Am. St. 54.

Adverse possession; what is. *Taylor d. Atkins v. Horde* (1757), 1 Burr. (Eng.) 60, 2 Sm. L. C. 583-727, ext. n., 1869-1990, 9th ed., 3 Gray, Cas. Prop. 47; *Mews' E. C. L.*; 4 Kent, 483-487; 3 Wash. R. P. 127, 132; 2 Wh. Ev. 1312, 1352; *Holtzman*, 168 U. S. 278, 16 Rul. Cas. 298-392; cases; 1 Cyc. 968-1165.

Possession; what essential. *Ewing*, 11 Pet. 41, 9 L. ed. 624, n.; *Defrelze*, 94 Cal. 653, 28 Am. St. 151-162, ext. n.

Successor has right of continuity from predecessor in possession. *Illinois Co.*, 119 Wis. 122.

Nepean v. Doe d. Knight (1837), 2 M. & W. 894, 5 Barn. & Adol. 86 (26 E. C. L. R.), 2 Sm. L. C. 583-727, ext. n., 3 *id.* 1852-1990, 9th ed.; *Fed. Cas.* 8, *Thayer*, Cas. Ev. 109, 8 Rul. Cas. 512; *Mews' E. C. L.*, 1 Tay. Ev. 157, 2 Wh. Ev. 1276, 1 Wash. R. P. 621; *Davie*, 97 U. S. 628-642 (statute and approving *Nepean*; *Alexander*), 118 N. C. 766, 54 Am. St. 757, n.; *Preble*, 85 Me. 260, 21 L. R. A. 829-835, ext. n. *Cited*, § 174, Gr. & Rud.

Right to acquire title to adverse possession to lands devoted to a public use. *Northern Pac. R. R.*, 25 Wash. 384, 87 Am. St. 766-782, ext. n.

Possession of part of a tract is possession of the whole. *Seals*, 80 Miss. 234, 92 Am. St. 801, n., 88 Am. St. 703-704.

One must recover on the strength of his own title. *Nepean*; *Davie v. Briggs*; *Armory*; 180; *In equali melior jure*, etc.;

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Bradshaw v. Ashley (1901), 180 U. S. 59.

Presumption of death from absence. *Nepean*; *Francis*, 180 Pa. 644, 57 Am. St. 668, n.; 1 Gr. Ev. 41.

Adverse possession; generally. 2 Gr. Ev. 430-448; 3 Wash. R. P. 123-179; *Norman*, 98 Ala. 181, 39 Am. St. 45, n.; *Cameron*, 148 U. S. 301; *Ricard*, 7 Wheat. 59; 1 Cyc. 968-1165; *Wilson*, 56 W. Va. 372, 107 Am. St. 927, n.

Color of title; what is. 2 Sm. L. C. 710, 8th ed.; *Taylor v. Horde*; *Cramer*, 81 Ia. 225, 9 L. R. A. 772, n.; *Nelson*, 160 Ill. 254, 31 L. R. A. 325, n.; 1 Cyc. 1082-1101; *Powers*, 1 N. Dak. 254, 88 Am. St. 691-729, ext. n.

Laches as a bar. *Michoud*; *Cottrell v. Watkins* (1893), 89 Va. 801, 37 Am. St. 897, 19 L. R. A. 754; *Bell*, 73 Cal. 285, 2 Am. St. 791-808, ext. n.; *Neppach*, 20 Or. 491, 23 Am. St. 145, n.; *Johnson*, 18 Ala. 50, 52 Am. Dec. 212-221, ext. n.; notes, 80 Am. Dec. 390, 66 Am. Dec. 183; *Bigl. Fraud*, 441-450; 16 Cyc. 150-180 (laches and stale demands); 1 Pom. Eq. 418, 2 *id.* 965; notes, 12 Am. Dec. 368-375; 3 Page, 1505-1711; *Wood*, Lim. 58-63, 200-220; *Penn Mut. Life Ins. Co. v. Austin* (1898), 168 U. S. 685. Equity applies in discretion. *Alsop*, 155 U. S. 448.

Suit must be diligently prosecuted. *Johnston*, 148 U. S. 360. See LACHES.

Contract may limit by shortening the time in which demands are to be made and suit brought. *Hill v. West*, U. Tel., 85 Ga. 425, 21 Am. St. 166, 3 Am. R. R. & Corp. Rep. 400-406; cases; *Greenh. Pub. Pol.* 505. *Modus et conventio*, etc. *Firemen's Fund Ins. Co.*, 38 Neb. 150, 41 Am. St. 727, n.; *Queen of the Pacific*, 180 U. S. 49 (demand of a common carrier). *Contra*, *Miller*, 54 Neb. 121, 69 Am. St. 709, n.; *Phoenix Ins. Co.*, 68 Kans. 432, 104 Am. St. 412, n. *Common carriers; their limitations of first class tickets invalid.* 84 Am. St. 397.

Statute may require notice of intention to sue to be given. *Arp*, 130 Wis. 454, 118 Am. St. 1036.

Lex loci and lex fori. See Van Voorhis; *Terry v. Anderson*.

Infraction against pleading the statute. *Holloway*, 55 N. J. 583, 62 Am. St. 826; cases; *Wilkinson*, 37 Miss. 579, 75 Am. Dec. 84, n.; *Davis*, 156 U. S. 680 (unconscionable defenses may be enjoined).

Estoppel to plead defense of. *Chesapeake R. R.*, 114 Ky. 628, 63 L. R. A. 193-206, ext. n.

Agreement to waive will operate as an estoppel. *Holman*, 117 Ia. 268, 62 L. R. A. 395, n., 94 Am. St. 293.

Trustees cannot claim statute against beneficiaries. *Burdick*, L. R. 5 Ch. 233, 14 Rul. Cas. 565; *Flitcroft's Case* (1882), 21 Ch. Div. 519-537; 16 Rul. Cas. 263, 1 *Bigl. Fraud*, 27.

Who may plead. *Hopkins*, 71 O. St. 141, 104 Am. St. 737-770, ext. n.

Creditor's bill; do not run against, before judgment is established. *Brundage*, 101 Ia. 256, 63 Am. St. 382. *Prescription*; rights gained by. 1 Wat. Tres. 630, 631; 2 Gr. Ev. 437-446.

Statute once a bar cannot be repealed to revoke the defense. When one has a defense under existing laws it cannot be taken away by legislatures. *Terry v. Anderson*. Statutes cannot divest vested rights nor obstruct the due administration of justice.

Demurrer may raise issue of the statute.

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Sturges: 111; Cowhick. *See* S. v. Parsons (1897), 147 Ind. 579, 62 Am. St. 430. A general demurrer will not raise the defense; it must be specified as in a special demurrer. Joergenson, 28 Wash. 477, 92 Am. St. 888, 102 Am. St. 118-124.

Since the defense may be waived, the requirement that the demurrer shall specify the ground is defensible. For the ground of the general demurrer can never be waived, which is a necessary rule. *See* DEMURRER; Campbell: 2; 102 Am. St. 118-124.

In actions against officers and stockholders of corporations. Boyd, 116 Wis. 155, 94 N. W. 171, 96 Am. St. 948.

On principle unreasonable restrictions cannot be imposed upon a carrier's ticket. And it is held that time limitations cannot be placed on first class railroad tickets. 84 Am. St. 397; R. R. v. Turner (1897), 100 Tenn. 213.

Generally: 3 Page, Conts. 1646-1671.

LIMITATIONS OF INDEBTEDNESS: Beard v. Hopkinsville. Constitutional law. Addyston Co., 197 Pa. 41, 80 Am. St. 812, n. (when is the limitation passed); Ottumwa, 119 Fed. 315, 59 L. R. A. 604-631, n. (municipal corporations).

LIMPUS v. GENERAL OMNIBUS CO.: *See* M'Manus. *Cited*, §§ 306, 307, Hughes' Proc.

LINDSAY v. COOPER (1892), 94 Ala. 170, 33 Am. St. 105, 16 L. R. A. 813, 11 So. 325.

Cited, § 184, Hughes' Proc.

Statute of frauds; equitable estoppel as a basis for title to real estate. Allegans contraria, etc.; Crosby; Moller (contracts); In pari materia.

Estates to land pass on equitable estoppel. Ewart, Estop. 206; Piper, sub Ashby.

Estoppels; nature of. Gjerstadengen, 9 N. Dak. 268, 81 Am. St. 575, n.

LIQUIDATED DAMAGES: As distinguished from penalty. Ans. Conts. 255, 256, 311; Kemble: 391; 1 Suth. Dam. 279-299 (stipulated damages).

LIQUOR LAWS: Liquor dealers' liability for acts of drunken persons. *Sub* Scott v. Shepherd; 85 Am. St. 446-454, ext. n.; Am. Crim. Rep.; 2 Bouv. Dic. 263-265; And. Dic. (liquor; prohibition).

LIS PENDENS: Tilton v. Coffield (1876), 93 U. S. 165, 23 L. ed. 858; Stout, 41 W. Va. 339, 56 Am. St. 843-878, ext. n.; 1 Beach, Eq. 374-381; 1 Freem. Judg. 191-214; 2 Pom. Eq. 623-640; Mews' E. C. L. 334-342; 2 Bouv. Dic. 266-268; And. Dic.

Purchasers must take notice of litigation. Hitz, 185 U. S. 155; Mews' E. C. L. 334-343; also its records. *See* CONSTRUCTIVE NOTICE; *Caveat emptor*; 25 Cyc. 1447-1486.

Constructive notice is enumerated as one of the conserving principles. It is a source of many learned and recondite rules. It is closely associated with the record or constitutional rule, namely, *what ought to be of record must be proved by record and by the right record*, which is enumerated as the fourteenth conserving principle. The interactions of these principles are a mesh of interactions throughout procedure. *See* IDENTIFICATION; CAUSE OF ACTION.

LITERARY PROPERTY: 25 Cyc. 1489-1501. *See* COPYRIGHT.

LITERATURE: Wisdom has fled the borders and patriotism is dead where

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bright, young and ambitious minds, seeking intellectual advancement, are misled and ruinously duped. The welfare of the state depends upon its trained, developed intellects and particularly those of the statesman and jurist. Such minds must assume and direct the destinies of governments. The soldier is not of more consequence than the lawyer. The divine injunction not to offend little children is as applicable to governments as to individuals as all history shows. The imaginative may conceive the idea that government can also tie a stone to its neck and meet its fate in the sea as well as may the individual. Crises come to governments when their existence depends upon the loyal and intelligent devotion of its citizens. Governments must protect and educate the young, the dependent and the defenceless. When they ask for bread they should not be given a stone, and when they are so treated they have good ground for complaint and naturally resentment if this should become aroused.

As to the above facts great teachers and philosophers have spoken. Of the disregard of their admonitions history teaches. What one foretold soon came to pass from the operations of Titus and Vespasian. For corrupting the "Athenian youth" one drank hemlock. Youths came to be taught by the example of demagogues. The Federalist refers to the results of their teachings.

Antiquity's rulers and statesmen observed the causes that crumbled the cornerstones of great empires and their consequent overwhelm. Washington in his farewell address refers to the necessity of right education and moral perception for the usefulness and perpetuity of government.

Rome fell in A. D. 476; causes that led to that cosmopolitan cataclysm must have profoundly moved Justinian, for in A. D. 533 appeared his great legal compilations which throughout all succeeding ages have had more or less attention. One of the designs of these great works was to assemble the fundamentals of the law so they could be found and learned. What relation *finding* and *learning* the law had to do with the downfall of Rome is an occult proposition that statesmen and

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jurists have long discussed and acknowledged.

The fundamentals—the Grounds and Rudiments of the law—are well presented in Justinian's works. These are comparatively few. Bacon selected and published twenty-five. Broom makes prominent 104, what and how many are not made prominent in Blackstone, §§ 14-21, Grounds and Rud.

The restoration of the civil law has quite fully come to continental Europe, and it is coming to America. Equity, international law, commercial paper, admiralty, the law of descents and distributions, also rational procedure, have practically restored the *corpus*. Like reason makes like law. History repeats itself. Antiquity did nothing in vain.

Antiquity protected the student. An edict of Justinian provided that whoso wrote upon the law must build his work upon the fundamentals or be criminally fined and have his glosses burned. The welfare of empires demanded drastic measures which were intimately, indeed inseparably, interwoven with the protection of the student. Strong measures may again have to be resorted to. A condition is before the law student that is almost hopeless and likewise insurmountable.

The future must be judged from the past. Government owes protection to the weak and defenceless; withholding that protection has always borne a crop of bitter fruit for all concerned. And thus it will be where the bright, hopeful young mind sets out to learn its country's laws and is turned over to rapacious commercialism utterly indifferent as to whether it gives the expected blessing or a gold brick for the student's confidence, time and money. A certificate of deception as a diploma is a cruel, heartless exchange for what the student gives. From the American Bar Association reports it can be shown that in the opinion of many prominent teachers there is something serious ahead for the student and his friends. From these reports it appears that his condition is pitiable and loudly calls for protection from those who are able to see and discharge a high duty and a grave responsibility. His friends should discharge this duty.

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There are other standards by which to test the condition. The judges who have made the great decisions of the centuries grounded them on the fundamentals commended and enforced by Justinian. Throughout all ages these fundamentals have been made prominent and accessible; but probably never less so than during the last generation in American states, wherein a score of states have so far departed therefrom, that they are viciously undermining the entire fabric of the law by such new dispensations as this: that pleadings can be waived. See Hughes, Proc. pp. 7-32; Preface, Datum Posts, also of Grounds and Rudiments, Vol. I.

A disregard of *Frustra probatur quod probatum non relevat* (it is vain to prove what is not alleged) and its cognate maxims will overwhelm even a certain and protective jurisprudence. Respect for these maxims will lead aright and anchor most safely. 38 Chicago Legal News 260 (1906); 64 Cent. L. J. 129-134, 169-174, 297-298; 66 *id.* 347. See ILLINOIS; MISSOURI; Dovaston: 217.

Those who countenance and uphold variances, and think legislatures can authorize them, do not know fundamentals. They do not comprehend the profound functions of pleadings, nor why "*allegata et probata* must correspond" is an essential rule in a constitutionalism, and is related to the rule, "a court is bound by its record," and *must be* in a government of limited and defined powers. See GOVERNMENT; CONSTITUTIONALISM. Were it not, then by what would it be bound? Now, bear in mind that the so-called greatest authors and writers and high courts of states may be cited in denial of the last maxims cited. See cases Hughes' Proc., pp. 29-32; also, 2 Thomp. Tri. §§ 2310-2311; And. Steph. Pl. 230, 2d ed.; cases; 1 Bates Pleading, Practice, Parties and Forms, 511, 512.

Every phase of this rule is commended in the great work of the age. 2 Cyc. 691-692; cases; *id.* 715; 12 *id.* 372, 390; 16 *id.* 403-406. Scores of pages therein can be cited *pro* and *con* and all with equal commend. The gatherings of conflicting cases and rules are hopelessly confounding, they are utterly bewildering.

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There are limitations of the human intellect; and the average capacity is quite limited. When the American let the idea get abroad and take root that there is no prescriptive constitution he made of his jurisprudence a shaded and withering plant. That notion has made of jurisprudence in American states a tremendous overflow, which is now a flood of jargons, of hydra-headed jurisprudences, a comprehension of which is beyond human capacity. Great principles are swayed, they are drifted in or out, by every wind of doctrine. *Lex non exacte*. From the dreadful confusion and wreck there is no safety line to grasp and hold to except the Roman, the English and the Federal laws. The states have destroyed their jurisprudences. Lange: 159. For the galaxy of great cases only a few can be accepted.

Students no longer study fundamentals. This may be tested by starting from those of Justinian or Bacon or Broom and examining the student. Widely advertised books for the student's guides and counsellors proclaim that they are the *ne plus ultra* efforts of a multitude of professors in leading colleges and yet these never cite nor discuss one of these fundamentals. Instead three-fifths thereof are a reprint of garbled pickings from an ordinary law catalogue and the remainder a pad of inferior rules of court, and a mere accumulation of insidious attacks on all works not promoting the late case publications, and the latest publications of the publishers and of concerns they are connected with, as the octopus corporation operates dummies. The astute advertising agent of such publishers evidently conceives these works and retains an editorial staff, a "corps of authors," to lend their names to the performance. Such seems to be the current conception of a great book for the student. Powerful and influential reviews and ceaseless advertising commend it as such. These do not understand their position in this way: that they should lay aside their prejudices and predilections this far, that they should fully and truly speak of a performance according to its design and purpose, *e. g.*, if an author with many lawyers agreed that Broom's Maxims, Smith's Leading Cases, Greenleaf's

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Evidence, Story's Equity Pleadings, Mechem's Agency and the great federal cases were the best of matter and that all of that matter could be arranged upon a blended plan of case, maxim and topic-head so that that matter could be more quickly and easily found than it could with those excellent works in hand, this labor should be judged from that standpoint and not from a learned discussion of the merits of those works, and whether they are obsolete or not. Such a review is a subterfuge, it is evasive. It is a sham and imposition.

In justice to the work reviewed the main and principal question should be squarely met and disposed of; it should not be shunted and ignored. Such reviewers are not what they should be; they are not good friends of the student or book buyer. Whether they are the friends of certain schools and school publishers and publishing houses the student must learn and judge until the power of government interferes as of old.

It seems defensible to say that misrepresenting one's work by failing to present it fairly and squarely should be actionable in a government that pays due regard to so important a matter as legal literature. There are great precedents for liability resting on a less footing of reason and for the public welfare.

Legal literature and instruction is casting too much responsibility upon the student. He must choose and if unwisely he must suffer the consequences. In America the matter of a legal education is a free for all, and all schools, all sects and all teachers are saying all things. The conflicting theories have created a condition that is perfectly bewildering. There are all kinds of literature for all men and every ism. The result is an abracadaba. The student will sooner or later discover he has been wronged or he will conclude that law with all it stands for in government is a groundless claim to rest the yoke of government upon.

There come times to governments when they need the loyalty and devotion of the jurispudent to lead, to teach and to instruct. The enemies of society often increase and organize and turn and rend government. The fundamental right of gov-

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ernment to exist is fully understood only by the lawyer; he can best state, explain and vindicate the operations of government. It is easy to conceive that a great government needs more than 100,000 lawyers to defend and safeguard it from its restless and misled enemies. It is easy to see how the duped and cheated law student might be lost for a position for which right literature and training would fit him; also that as the abused child brings a mystic curse so will the cheated and misled student.

In the last generation supposed distinctions between *adjective* and *substantive* law have been greatly emphasized. In a late work for law schools it is stated that the American and English Encyclopedia was followed by a second edition in thirty-two volumes to present the *substantive* law, and this along with the Encyclopedia of Pleading and Practice to present the *adjective* law in twenty-three volumes, in all fifty-five volumes. These great works were not sufficiently acceptable upon those theories, and for a correction the Cyclopedia of Law and Procedure is designed and will follow in some forty volumes. If this is quite true it discloses the condition already referred to. From this viewpoint the student should pause and consider.

One sect writes and teaches that maxims are no longer the law and should be excluded. This is immediately contradicted, *e. g.*, *Scott v. Ford (Or.)*, 68 L. R. A. 469, 472, discussing *Ignorantia legis neminem excusat* and its application in the old case of *Bilbie v. Lumley* (Mansfield). *Res inter alios acta* is given fifteen pages (17 Cyc. 274-289); *Volenti non fit injuria* its greatest resume in 1 Labatt, Master and Servant, §§ 368-386; *Expressio unius est exclusio alterius*, 19 Cyc. 23-29; 115 Ill. 165; *S. v. Sheppard (Mo.)*; Dawson, 79 Mo. App. 245, quoting Mitchell, 103 U. S. 64. These decisions, like those in the year books, are built from the maxims.

Commercialism's din and hurrah for the "late" case meets a rebuke in *Rice v. Travis* (1905), 117 Ill. Ap. 644, where four fundamental points were correctly decided. One of these has been repeatedly and most unsatisfactorily discussed in Illinois for two generations. But

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Judge Baker makes no reference whatever to the Bable of confusion; he was not led or bewildered by the "latest" case, for he quoted and followed *Crogate's Case* (Smith's Leading Cases), 300 years old. The sage counsel of Solomon, "Remove not the ancient landmarks which thy fathers have set" is not much respected in several states. *Lex non exacte*.

From the foregoing facts the intelligent student can deduce much that is of great import to him. He should consider all sides of leading questions. In order to do this he should carefully read the Introduction to Hughes' Procedure, also the demonstration of facts therein, that the maxims and cases illustrating the application of these constitute the philosophy of law, and that these elements are as old as the hills, "are rock ribbed and ancient." They go on from age to age "without variableness or shadow of turning" and are necessarily unchangeable. They have worn long, but they have worn best. See 38 Chicago Legal News, 260 (1906); THEORY; VARIANCE; *Verba fortius*.

Entire branches of the civil law of Rome have been imported. Some have already referred to these and others have been injected into every artery and vein of the law; they carry with them the great canons of construction. These are the bed of Procrustes; by them all is measured. The student who has not been shown these facts and made familiar with those canons and where they are found and discussed has ample ground for complaint, and when he is awakened he will complain.

Literature that excludes or obscures fundamentals does not wear nor teach well. It has come around in half a century that books are developed singularly for certain sects and schools. Reference has been made to one. Formerly the book for the student was a useful book for all. But this is no longer so. Long rows of books are published for students only, which the practical lawyer will not have. He cannot use them. They are not written upon, they do not cite, they do not explain the great fundamental underlying principles. The philosophy of these great fundamentals is expressed in the maxims and these are illustrated in both old and late

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cases. There is no difference. Those who publish and teach the contrary are in error. Now, it is for the student to look and judge. There are errorists and the student should, if possible, determine who these are. Until government or real friends protect the student he must meet the emergencies and really great dangers as best he can.

From the foregoing it may be stated that a government goes with its jurisprudence, up or down. It has a mystic influence. This fact is well perceived and fully understood by statesmen. The Federalist well presents it. The farewell admonitions of the Father of his Country have been referred to. A subverted or corrupted jurisprudence is the prologue of a decline and fall.

If a dozen fundamental principles of law are well expressed and introduced to a logical mind, it will sprout and grow them as does the genial soil the acorn. They are like the grain of mustard in the parable. Of course the soil must be prepared, the right seed and season chosen. It is a waste of energy to attempt to deal with the entire plant or its parts. The *acorn*, not the *giant oak*, is required. It is best to start right and from right viewpoints. As plants have seeds, religions their few commandments and a few great sermons, so the law has its germs, *e. g.*, "Ye cannot serve God and Mammon" is susceptible of many paraphrases. As it is expressed it is theology, or morals, or jurisprudence. It pervades equity jurisprudence and procedure wherein it is applied with great strictness. It is a familiar rule that one cannot contract or act where his integrity and his interest are in conflict, or one cannot be judge of his own dispute. From that acorn has grown a mighty oak. And this should be conceived from the *germ*, not the *latest leaf or bud*. As that fundamental is taught and impressed so it is with others.

Government should protect its jurisprudence. It is the means of the lawyer, who develops from the student.

There are crises where the statesman on the look-out and at the helm must save. This is well illustrated in the *Trent* affair; therein wise counsel was worth armies and navies. "Peace hath her victories not less renowned than war."

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The soldier must open the way and gain the ground; then the statesman must build thereon. Each is indispensable. Each deserves governmental recognition, supervision and protection.

Reference has been made to the heralded student's friend and guide, which is a misnomer if the motto of the old lawyer was right, which was: "When you know the maxim or leading case on the subject you are considering generally your work is more than half done." He believed the maxims were the roots and heartwood of the law and so he taught, wrote, briefed and argued his case. He knew a great case when he saw or heard it (*e. g.*, the *Squib Case*), also how to find it. He knew the acorn from which it sprang. He knew the value of a table of maxims or of cases; he could find them cited throughout all literature; for this finding he knew the singular value of old, widely cited and found cases; he could judge of the critic or reviewer who called the highest use of these a fault or hobby.

Now if a work is developed to meet the views and acceptance of the old lawyer, *e. g.*, give the maxim or leading case on a subject under consideration if there be such maxim or case; here is a distinctive performance and a reviewer should deal squarely and candidly with what was attempted and admit or deny that the principal purpose has been accomplished. But do they, is the question. Whether they do so or not is easily determined.

The late so-called student's friend and guide makes no reference whatever to the plans and views of the old lawyer. It is the effort of publishers and their advertising agents to pervade all of their output with an air of something new or modern or American. Such assumptions are very misleading. Buyers of books know they are often misled with catching titles that bear the suggestion of modern or American or on trials or the art of some little branch of the latter down to how to win a case. Evidently it was possible to hawk off the publishers' stuff for legal literature in ancient times, and so it is in modern.

The facts are abroad which show that aggressive writers and reviewers have practically silenced the

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voice of able and observing lawyers and jurists, for they have tacitly acquiesced in the advocacy of a new dispensation already referred to, namely, that pleadings can be waived. Reviewers who have taken up this fallacy and shown that it is subversive of our jurisprudence and inimical to a government of limited and defined powers are not sufficiently prominent, if indeed they can be found at all. Such a doctrine is vicious and an insidious poison. It is the prologue of the advance of arbitrariness, of usurpation and abuse of power. Such is the deep recondite influence of jurisprudence upon government, its liberty and its freedom. But do the great writers and reviewers so understand it when they emasculate the mighty works of the old lawyer and for their basic primal rules of protection insert that variances are no longer of consequence, that the codes and practice acts have abolished the maxim *Frustra probatur quod probatum non relevat* above cited. This maxim is an acorn from which springs a giant oak. A constitutionalism depends upon respect for it. It is well to refer to it as the old lawyer saw and taught it; as Mansfield saw it in *Bristow v. Wright*. Some of the new lawyers pass that by as obsolete, and of course the sections that the old lawyer wrote from it.

It is well to ask at this late day why reviewers have acquiesced in the "modern and enlightened view" that pleadings can be waived, that the foundation of judgments can arise from the statutory record or evidence *aliunde*; that the mandatory record of the old lawyer can be abolished; also why it is if a work is exploited to confute the "new and enlightened view" and we may add overpowering advocacy of the greatest writers of this generation, reviewers refuse to deal candidly with the subject and the performance.

If upon investigation the student well understands the facts above stated then he will be somewhat enabled to judge of the condition that surrounds him, also of those who essay to lead and to direct him.

The effect of mischievous literature is to lead the students from maxims and old cases. Figuratively he is led into a morass lighted up only by the *ignes fatui*. To illus-

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trate: The vast digest and cyclopedic works are likened to a history that would essay to present the rank and file and camp followers of Xerxes' army. But in history, as it is developed, only notable and prominent matter is given space and discussed, and so it is in general literature. Now, why should not this be so in legal literature? A history reprinting the roster and its calls of vast armies or hordes would not be most available, for it would exceed human ability to handle it, much less to read and digest it. Therefore, as general literature excludes likenesses, numberless variations and inferiors, so should legal literature. From this view the grounds and rudiments of law should be chosen, surveyed and impressively discussed, made prominent and engraved upon the memory. The only way to do this is from its chief maxims, the condensed good sense of nations. There can be no better matter by which to measure all, and to construe all the compilations of Justinian and all that has sprung from them, the writings of Bracton, Britton, Fleta, Bacon, Grotius, Mansfield's, Story's and Kent's decisions, the Code Napoleon, treaties and international law, which are a part of the supreme law of the land in America. It is well to observe that one part of this law is not construed by one code or one system and other parts by different codes and systems. The great canons of construction apply to all collocations of words alike. Now, where are these canons found? Do they spring from feudal or middle age law or are they from beyond? Are they the gifts of ignorant martial despots or are they gifts from on high, from reason, mercy and protection? Are these changeless or are they warped and bent or ignored as the interests of commercialism's output require? Now, where are these old prominent matters of the law found? Can they be readily found in vast compilations of matter that make mere accumulation and inferiors equal to old and prominent matter? It is this matter that is the acorn from which have sprung the roots and heartwood of the law. Now, can we find a substitute for that matter in the leaves, the latest buds or the

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squirrels' nests? Looking from the old prominent matter is seen one way of finding and learning the law. But it is not exclusive. There is no royal road to learning. Other plans are advocated. The student should be familiar with all. On these subjects considerable volumes may be found, *Brief Making: Use of law books* (1906), wherein the excellencies of very late publications, including some in preparation, are extensively noticed and discussed. *See* p. 37, *id.* (denounces text books), pp. 163-172, *id.* (extols *Century Digest* and *Cycs.*)

There are those who believe that the history of the law must yet be written. Cambridge University in England in 1884 awarded a notable prize to a distinguished scholar for an essay that was written from and around that proposition. In its discussion, Teutonic and English history is learnedly reviewed and Roman history predominates. It may be said to include the Norman-French. Without more, it may be said that the history of jurisprudence is the history of civilization. At least it includes more than England, the middle ages and feudal times.

The prize essay of the great college asserts and reiterates that "the air was filled with the Civil Law before Glanville, Britton, Fleta, Coke and Blackstone. In such discussions all of these are taken into an accounting which every student should consider. There is also little more than passing mention of Hale and Holt. Bacon is not mentioned. When the history of the law of England is written it is not possible that the views of the greatest philosopher, statesman and jurist will be omitted after all he said and did.

All must concede that jurisprudence, like the peoples of modern nations, is a gathering from many sources. It has its component parts and these are individualistic. One of these parts may be Roman, another Teutonic and another Norman, or French. The great fundamental principles borrowed from the Roman leaves them Roman still. They stand to prove that "the Roman still holds dominion over this world by the silent empire of his law."

It must appear very clear that

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each part of the law has its own history. Conceding this to be true, then Broom's *Maxims* and such works are excellent histories of those parts or fundamentals they present and correctly treat. Accordingly, all truly fundamental works are *pro tanto* histories of the law. Accepting Broom's *Maxims* as such a history, and looking from the contents and comparing these with other histories of the law, then their omissions may be estimated; *e. g.*, *Salus populi suprema lex* is a great principle and of course has its history, also its applications. Now, the question is where can a better history of this great principle be found than in maxim works? This is a principle which all systems have incorporated; it and its cognates form a very considerable part of the law.

Accordingly it is very well to know where and upon what plan it is most impressively and instructively presented. If this be the maxim plan the student should know it.

To state such principles in the Latin is to impress their origin best. When they are so stated, without more, it is manifest that their further history must be pursued into the dim twilight of antiquity. *See* *CIVIL LAW*. Such maxims are the condensed good sense of nations. When correctly stated, whenever they are understood they are received as is the coin bearing the right stamp and having the right content weight and ring.

Audi alteram partem upon its face speaks its origin. That no one shall be condemned unheard is a principle that lies at the base of the due administration of the laws. It is most ably discussed in *Windsor v. McVeigh*. International law respects that principle and of course very naturally, for it, too, is from the Roman. The very recent case of *Haddock v. Haddock* is nothing more than a vindication of that basic principle and of that law. This case is only an instructive application of an archaic principle, "rock ribbed and ancient." It stands for justice without which the mightiest have ever fallen. "You may build your palaces of authority high into the skies but without justice the pulse of a woman will beat them down."

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Parts of that principle have been discussed and applied in *Mills v. Duryee*, *McElmoyle v. Cohen*, *Pennoyer v. Neff* and *Andrews v. Andrews*, all U. S. cases; also in *Borden v. Fitch* and other New York cases, also in *Needham v. Thayer* (Mass.) etc. etc. To state more to one familiar with the maxim and the history of its applications by the Federal Court, would result in another "useless grist of profuse jargon."

This court decides exactly as if there were an unwritten constitution.

It decides like the high courts of England, which are bound by the unwritten constitution; there is no difference. This fact finds support in cases like *Church of the Holy Trinity v. U. S.*, *S. v. Sheppard* (Mo.) and the *Haddock Case*. Marshall's "Bank" Case has many correlatives. Wherever fundamental law annexes itself by implication, there is an unwritten constitution. The argument for implications is an argument for an unwritten constitution. It is this which enlarges or contracts the language of constitutions and statutes. It is constituted of maxims, precedents and customs. Now the history of these is very important to the lawyer.

The lawyer who has settled views of the history of the fundamentals of the law is very unlike one who has not. It is this history that shows whether we have an unwritten constitution or not in America. To what extent *Salus populi suprema lex* is a part of the supreme law of the land must be largely judged from the Roman also the Greek view of it. The latter understood well as may be judged from the epitaph of Leonidas:

"Go tell the Spartans, thou that passest by,
That in obedience to their laws here we lie."

The lawyer who knows fundamental principles and their history is best able to judge whether or not there is an unwritten constitution. Now, whether there is or not is one of the most important of questions. It is to know the limitations of primary law. The law is often deficient; when it is then one should know whence it is supplied. Decisions of many high courts show that it is supplied from the Civil

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Law. *Lex non exacte; Regula pro lege.*

The true history of the law must in the nature of things attend its first stepping-stones. And it seems fair to say that as it is with the first step so it is with others. Consequently if the grounds and rudiments can be gathered and the history and position of these indicated, as already explained and illustrated, then this blazes the way for grappling with and mastering the entire body of the law. If the stepping-stones are the maxims then these should be rightly viewed and accepted, not rejected and cast aside as stumbling blocks. The consequences of such an error are too obvious to need more than passing mention.

The fact is abroad that commercialism has much to do with legal literature. Also that those for whom it is designed are unduly credulous.

Sometimes it seems clear that they are really impressed with the idea that the foundations of the law have been laid when some certain publishing house or some alleged new publication is started. There are tangible facts which show that new dispensations are written and proclaimed, such as that the pleadings can be waived, also the mandatory record.

Plausible and attractive writers have made for themselves great reputations advocating such departures. (See LITERATURE, Hughes' Contracts, also Procedure; 2 Thomp. Tri. §§ 2310, 2311; And. Steph. Pl. 230: cases, 2nd ed.; 1 Bates, Pleading, Practice, Parties and Forms, 511, 512).

All literature as well as mathematics is founded on a few characters. As it is with these, so it is with the law. It has but a few grounds or rudiments. These if rightly understood guide and lead and safely anchor.

The new dispensations last referred to can not flourish where the mystic rule, every presumption is against the pleader (*Verba fortius accipiuntur contra proferentem*) and its cognates are comprehended.

The literature that denies fundamentals can only be useful to mislead students and to dupe courts. Those who know fundamentals can

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readily detect juggling with jurisprudence. They are not astonished that there are courts that will respect the basic principles above mentioned. They are not astonished at cases like *Haddock* nor do they continually resist recognition of the unwritten constitution. See **THEORY**; **VARIANCE**; *Verba fortius*.

LIVERY STABLE KEEPER: 25 Cyc. 1504-1515.

LIVINGSTON v. ROOSEVELT: L.C. 345.

LOAN ASSN' v. TOPEKA (1875), 20 Wall. 665, 22 L. ed. 548; Boyd, Const. Law, 78, 1 Thayer, Const. Cas. 169, 2 *id.* 1235; Cool. Tax.; Tucker, Const.; 54 L. R. A. 243.

Loan Association Case stated: The city of Topeka voted municipal bonds to be donated to private commercial and manufacturing enterprises. Their validity came in question. *Held*, they were void; that a public municipal corporation cannot lawfully engage in such concerns.

Taxation must be for a public purpose. *Allen v. Jay*; *P. v. Town of Salem*. See **TAXPAYERS' REMEDIES**; *State ex rel. Garth*, 143 Mo. 287, 40 L. R. A. 280; *S. v. Cornell* (1895), 53 Neb. 556, 68 Am. St. 629.

A lack of interest is a lack of power, is a very important rule of agency, and especially of the limitation of the powers of governmental agencies. See *Hill v. Boston*. County commissioners cannot lease parts of a court-house to private parties. *State*, 144 Ind. 107, 33 L. R. A. 118, n. (limitation of the powers of counties). A statute cannot authorize a town to erect a hall for the Grand Army of the Republic. *Kingman*, 153 Mass. 255, 11 L. R. A. 123; *Stetson*; stated, 33 L. R. A. 119, 120. A statute cannot authorize the issue of municipal bonds to aid private enterprises (*S. v. Kelly*); nor to raise funds to lend to farmers impoverished by the ravages of grasshoppers. *State*, 14 Kan. 418. Nor to aid the rebuilding of a city destroyed by fire. *Lowell*, 111 Mass. 454, 15 Am. Rep. 39-62, ext. n.; *S. v. Froelich*, 118 Wis. 129, 99 Am. St. 985; cases; *Allen v. Jay*; *P. v. Salem*; *Hill v. Boston*.

State v. Davidson (1902), 114 Wis. 563; cases (state may bury the dead and care for survivors from a tornado, and so protect the public health. The village of New Richmond was swept by a cyclone, killing and wounding many, and destroying many homes. To bury the dead and to aid the wounded the legislature expended state funds. The payment of these was unsuccessfully resisted. The view was taken that the health and well-being of the state were involved. *Mahon*, 171 N. Y. 263, 89 Am. St. 810; cases; *Dodge*, 46 C. C. A. 661, 107 Fed. 827, 54 L. R. A. 242; cases; *Pritchard*, 109 Ia. 364, 46 L. R. A. 381, n. (limitation to appropriate public funds); *Cren*, 120 Mich. 550, 46 L. R. A. 407, n.; 70 L. R. A. 450.

LOBBYING CONTRACTS: *Trist*: 214.

LOCUS POENITENTIAE: Right to withdraw from an illegal contract. *Diggle*: 371.

LOEFFNER v. S. (Intent): L.C. 196.

LOFFUS v. MAW (1862), 3 Giff. 592, 4 Mews' E. C. L. 477, Ewart, Estop. 71, Bigl. Estop., Herm. Estop., App. L. R. 19 Eq. 174; disapproved App. Cas. 467.

Loffus v. Maw.—

Loffus stated: *Equitable estoppel*; trust coupled with interest. A niece was induced to bestow valuable services for an aged uncle, upon his representations that at his death he would make her valuable bequests. He read her a codicil to a will creating trusts in her. *Held*, he could not revoke these trusts. See *Allegans contraria*, etc.; *Horn v. Cole*: cases; *Pickard*; **ESTOPPEL**.

LOGAN v. U. S.: L.C. 249.

LOGGING: 25 Cyc. 1545-1602.

LONGBRIDGE v. DORVILLE (1821), 5 B. & Ald. 117, Mews' E. C. L.: stated; § 122, Hughes' Conts.; Smith, Langd.

LONGSTORY v. ID. (1903), 118 Wis. 159.

At common law wife had no property right in the discharge of the husband's marital duties. Late statutes giving her the right to sue for injury to her property or character do not include anything more. Expressio unius, etc. (Dissenting opinions.)

Lynch v. Knight stated and discussed. *Stare decisis* of leading importance. See **DEPARTURE**.

Codes are construed like other subjects, according to the principles of the common law. *C. v. Hess*: 215; *Kollock*; *Osgood*. See **MAXIMS**. *Verba intentione*, etc.

Remedial statutes are sometimes defeated. *Terre Haute R. R. v. Indiana* (U. S.); *C. v. Wampler*, 104 Va. 337, 1 L. R. A. (N. S.) 149, n.

LOOMIS v. TERRY (1837), 17 Wend. 496, 31 Am. Dec. 306, 1 Thomp. Neg. 492 (reviews and approves *Ilott* and *Bird v. Holbrook*).

Right to defend premises with savage dogs. *Hooker v. Miller*; *Bird*; *Aldrich v. Wright*. An owner is liable for injuries caused by noxious things kept on his premises. *Fletcher v. Rylands*; *Scott* (*Squib Case*); *May v. Burdett*; *Sic utere tuo*, etc.; *Ilott*, sub **SELF-DEFENSE**.

LORD CAMPBELL'S ACT: See *Actio personalis*, etc.

LORDS BAILIFF-JURATS OF ROMNEY Marsh v. Corporation of Trinity House (1872), L. R. 3 Exch. 204; in Exch. Chamber, L. R. 7 Exch. 247; 2 Thomp. Neg. 1063-1101, ext. n.; 36 Am. St. 338, Mews' E. C. L. Cited, § 347, Hughes' Proc.

Proximate and remote cause. *In jure*, etc. Combined result of negligence and accident. *Salisbury*; *Sharp v. Powell*; *Gilson v. Delaware*.

LORD'S DAY: 2 Bish. Cr. Proc. 812-818; *Crepps*: 113; *Bloom*: 266. See **SUNDAY**; *Dies dominicus*, etc., Hauswirth: 51.

LOS ANGELES R. R. v. DAVIS (1905), 146 Cal. 179, 79 P. 865, 106 Am. St. 20-23, n. (*contra* cases).

Corporate existence; pleading of. Omission of allegation of corporate existence in the statement of the case is immaterial; it is not a ground of general demurrer. Unless the complaint affirmatively shows lack of capacity it will be presumed to exist, for the code so provides. *Ut res magis valeat quam pereat*.

In *Phœnix Bank* (1869), 40 N. Y. 410, no mention of a corporation whatever was made, still a demurrer thereto was overruled. The omission

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can only be taken advantage of by answer. *Harris*: 229. *Contra* cases are cited and discussed. It seems that but for a code provision the demurrer would have been sustained. Consequently it was conceded that statutes can dispense with material allegations. *Huntsman v. S.*

Several courts construe strictly according to the letter (*Russell v. Shurtliff*, Colo.), disregarding fundamental principles reaffirmed by the code, namely, that the complaint shall contain facts sufficient to constitute a cause of action. This language should prevail in all cases. The rule requiring statutes to be construed *in pari materia* is often overlooked.

In several states the presumption of regularity will supply jurisdictional facts. See *Hume* (Colo.); *Schubach v. McDonald* (Mo.).

LOSEE v. BUCHANAN: L.C. 210.

LOST DOCUMENTS: C. v. Kane: cases; 2 Bouv. Dic. 280. *How proved. After diligent search secondary evidence is admissible.* C. v. Kane; 1 Gr. Ev. 588, 1 Wh. 129-151; 1 Tay. 398, 399; 2 Best, 472-491; Bagley, 9 Cal. 430; note, 64 Am. Dec. 687, 61 Am. Dec. 299; Galbraith, 3 Cold. 267, 91 Am. Dec. 281 (proofs requisite); 25 Cyc. 1607-1630. *Pleadings; records.* Cook, 11 Wall. 659; *Campbell v. Greer*: 2a.

Commercial paper; if lost, a recovery is allowed upon. Bridgeford, 34 Conn. 546, 91 Am. Dec. 744, n.; 2 Pom. Eq. 831; *Ans. Conts.* 27. *Actions on lost instruments.* Matthews, 97 Me. 40, 94 Am. St. 464-480, ext. n. Judgment may be proved as a lost document. §30, Hughes' *Conts.*

LOST PROPERTY: See FINDING.

LOTTERY: 2 Bouv. Dic. 281-283; McClain, C. L. 1315-1317; 25 Cyc. 1631-1656.

LOUGH v. OUTERBRIDGE: L.C. 293.

LOUISVILLE & N. E. R. v. LOUISVILLE (1897), 166 U. S. 709, 41 L. ed. 1173. *Record proper* must disclose a federal question. See *Freeman*: 287; *Furman*: 147a.

LOUISVILLE & NASHVILLE TERMINAL COMPANY v. LELLYET (1905), 114 Tenn. 368, 1 L. R. A. (N. S.) 49-137, ext. n. Legislative power to legalize nuisance; or damage to easements or ways or streets. *Hanson* (character); *Taylor v. Porter*; *S. v. Kelly* (property); *Story v. Bl. R.* R. (easements; streets).

LOVEJOY v. MURRAY: L.C. 289.

LOWE v. PERES (OR PERS), 4 Burr. 2225 (conditions in restraint of marriage). See *Scott v. Tyler*. Cited, §94, Hughes' *Conts.*; *Mews' E. C. L.*; *Smith*, *Conts.* 228; §158, Hughes' *Proc.*

Lowe stated: "I do hereby promise Mrs. Catherine Lowe that I will not marry any person besides herself; if I do I agree to pay her \$1,000 within three months after I shall marry anybody else." This is not a good contract. *Smith*, *Conts.* 228; *King v. King* (1900), 63 Ohio, 363, 52 L. R. A. 157, n. (contract not to marry).

LOWNSDALE v. PORTLAND: *sub Res adjudicata*. Decisions of one department of state bind the others. *Andes v. Ely* (1894), 158 U. S. 312; *Tulare Irrigation*, 185 U. S. 1, 24; *Uinta Tunnel*, 57 C. C. A. 200-218, ext. n. (land department decisions; when binding).

LOWMY v. MOORE: L.C. 104.

LUMLEY v. GYE (1853), 2 El. & Bl. 216 (75 E. C. L. R.), Bigl. L. C. Torts, 706, Ames, Cas. 600, 1 Rul. Cas. 706-728, n., 17 Rul. Cas. 285, with other cases to the same point; *Allen v. Flood* (reviewing *Lumley*); 97 Am. St. 919-928; 96 Tex. 449; *Bourlier*, 91 Ky. 135, 34 Am. St. 171; 117 Wis. 120 (enjoining breach of contract); *London Co.*, 206 Ill. 493, 99 Am. St. 185 (discussing *Allen v. Flood*); 36 Am. St. 840, 843, *Huffc. Ag.*; *Moran*, 177 Mass. 485, 83 Am. St. 289, 52 L. R. A. 115; *Ans. Conts.* 211; 4 *Mews' E. C. L.* 272; 6 *id.* 998; 9 *id.* 993; 11 *id.* 445; *id.* 42; *Ashby*: 273. Inducing a third person to break a contract is actionable. *Lumley*; *Wolf*, 113 La. 388, 67 L. R. A. 65 (interfering with employees), 69 *id.* 95.

Cited, §347, Hughes' *Proc.*

Interfering with another's tenants or property. *Gore*, 87 Md. 368, 67 Am. St. 352, n.; *Angle*; *Doremus*, 176 Ill. 608, 68 Am. St. 203, 43 L. R. A. 797, n. (boy-cotts, etc.). *Martell*, 185 Mass. 255, 64 L. R. A. 260-265 (reviews *Mogul Case*); 3 Page, 1325, 1326; 40 Am. St. 319, 21 L. R. A. 337, 54 Minn. 223, 231.

Mogul Case (1895), 15 Q. B. D. 476, 21 Q. B. D. 544, 23 Q. B. D. 598 (pools, trusts, monopoly, conspiracy, unions); 195 U. S. 204. See *Allen v. Flood*, 102 Am. St. 341-344.

Members of labor organizations may interfere for the good of their order. *National v. Cummings* (1902), 170 N. Y. 315, 58 L. R. A. 135; *Bohn*, 54 Minn. 223, 234, 40 Am. St. 313, 21 L. R. A. 337; 3 Page, *Conts.* 1337.

LUNATIC: *Molton*: 413; *Ans. Conts.* 115, 116, 317.

LUTHER v. BORDEN (1848), 7 How. (U. S.) 1, 17 Curtis, 1 McClain, *Const. Cas.* 595; stated in *Milligan's Case*. See **MARTIAL LAW; CONSTITUTIONAL LIMITATIONS**.

LYCOMING: *Sub Hill v. Boston*.

LYNCH LAW: 2 Bouv. 287; *And. Dic. Legibus sumptis*, etc.; *Receditur a placitis*, etc.

LYNCH v. KNIGHT (1861), 9 Ho. Lds. Cas. 577, 11 Eng. Reprint, 574, 2 Smith, Cas. Torts, 774, Sedgk. L. C. Dam. 725, 8 Rul. Cas. 382, 21 Cyc. 1617; *Cool*, Torts, 267; *Wolf v. Frank* (1904), 92 Md. 138, 52 L. R. A. 102; cases (misconduct of plaintiff may be shown in mitigation; *Lynch v. Knight* and *Winsmore v. Greenbank* cited and approved; 4 *Suth. Dam.* 1221, *Folk*, *Stark*, *Sland.* & *Libel*, 383, *Mews' E. C. L.*, 88 Ga. 763, 30 Am. St. 188, 18 Am. St. 261, 36 *id.* 810, 844, 1 Sm. L. C. 538, 8th ed.; 3 *id.* 1810-1815, 9th ed.; *Bro. Max.*; 1 *Add. Torts*, 51, 2 *id.* 1224, 2 *Kent*, 16.

Cited, §347, Hughes' *Proc.*

Defamation; remoteness. Slandering a wife to husband and advising him to exclude from access to her one about to succeed in seducing her, and by this means alienating the husband, is non-actionable. *Lynch, Roberts v. Id.*, 5 B. & S. 384 (117 E. C. L. R.), 8 Rul. Cas. 395.

Alienating the affections of an affianced lover is non-actionable. *Cool*, Torts, 326; *Case*, 107 Mich. 416, 31 L. R. A. 282.

Alienating husband's affections, actionable.

Lynch v. Knight.

Foot. 58 Conn. 1, 18 Am. St. 258, n. 6 L. R. A. 829, citing Lynch (there is no wrong without a remedy); Clow, 125 Mo. 101, 46 Am. St. 468-478, ext. n., 26 L. R. A. 412; Beach, 20 Wash. 266, 43 L. R. A. 114; *Contra*: Doe, 82 Me. 503, 17 Am. St. 499, 8 L. R. A. 833, n.; 21 Cyc. 1617-1626. Wife's affections; alienating of, is actionable. Fratini, 66 Vt. 273, 44 Am. St. 843-853, n.; Adams, 3 Ind. App. 232, 50 Am. St. 266; *Wingsmore v. Greenbank*, sub *Ashby*. A father may advise his son to divorce a wife. Tucker, 74 Miss. 93, 32 L. R. A. 623, n.; Oakman, 93 Me. 280, 80 Am. St. 396, n. Debauching a girl and inducing one ignorant of the facts to marry her is actionable. Kulek v. Goldman, sub *Ashby*; Pasley; Lonstorf. When wife may sue in her own name. Nolin, 191 Mass. 283, 4 L. R. A. (N. S.) 643-649, n.

LYNCH v. NURDIN (dangerous instruments causing injury to children). Sub *Scott v. Shepherd* (Squib Case).

LYON v. BRIGGS: See *Pasley*: 375.

LYON v. REED (1844), 13 Mees. & Wels. 285, 3 Gray, Cas. Prop. 254; Nickells, 10 Q. B. 944-951 (59 E. C. L. R.), 15 Rul. Cas. 512, n.; 2 Best, Ev. 543, 6 Mews' E. C. L.; Phene v. Popplewell (1862), 12 C. B. (N. S.) 334 (104 E. C. L. R.), 15 Rul. Cas. 518, n.; Kingston's Case, 2 Sm. L. C. (8th ed.) 885-893, star pages, 909; Browne, Stat. Frauds, 43-53, 1 Pars. Conts. 827, 2 *id.* 925, Bish. Conts. 260, 2 Add. 724, 2 Wh. Ev., 2 Best, Ev. 396, 543, Bro. Max. 698. §§ 180, 297, 328, Hughes' Proc.

Statute of frauds; "act and operation of law"; meaning of. *Lester*: 341. Estoppel of landlord to deny surrender. Grommes, 147 Ill. 634, 37 Am. St. 248, n.; Bro. Max. 698. Leases; extinguished by merger: 4 Kent, 104-105; Ewart, Estoppel.

MAG: See *M'C*.

MACLAY v. HARVEY: L.C. 327.

MACTIE v. FITE (1830), 6 Wend. 103, 21 Am. Dec. 262-305; Whart. Conts.; Adams v. Lindell; § 48, Hughes' Conts. (contracts by letter).

MADDOX: See *Scott v. Tyler* (conditions in restraint of marriage void); Lowe v. Peers. Cited, § 92, Hughes' Conts.

MADISONVILLE CO. v. TRACTION CO. (1905), 196 U. S. 239. Cited, §§ 85, 97, Gr. & Rud.

MAGNA CHARTA (June 15 or 19, 1215; 17th of King John). See *Starr & Curtis*, Ill. Stat.; 2 Bouv. Dic. 289, 290. §§ 35, 352, Hughes' Proc.

The mandatory record was respected in 1215. Murray: 219. It requires certainty. §§ 157, 159, Gr. & Rud.

Assessments for taxation expressly guarded in Magna Charta. Tilton: 133. Demanded strict judicial and taxation proceedings. Tilton.

Law of the land; meaning of, under *Magna Charta*. Windsor: 1; S. v. Baughman: 268.

Due process of law (as contemplated in *Windsor*: 1 and *Hurtado*: 220), provided for in *Magna Charta*. S. v. Baughman: 268; Galpin: 63. Procedure demanded. Murray: 219. § 19, Hughes' Proc.

American constitutions and laws are construed according to the old law. Murray: 219; C. v. Hess: 215 (common law). *Verba intentione*, etc.: 8 Cyc. 725.

Construction of, is by the common law. Murray. It influences code procedure as it does all others. Harrikan v. Gilchrist

Magna Charta.

(1804), 121 Wis. 127 (able resume of fundamental principles). §§ 78, 152, Gr. & Rud. Title, 150 Calif. 289, 119 Am. St. 199-226, quoting *Pennoyer*: 58; Hurtado: 220.

MAGNETIC HEALER: Pretences of, fraudulent, when. See *Weitmer*: 268a.

MAHAN v. BROWN (1833), 13 Wend. 261-265; 1 Ames, Cas. Torts, 724, 28 Am. Dec. 46.

Cited, §§ 67, 296, 304, Gr. & Rud.

Intent is no element in trespass. See *MALICIOUS ACTS CAUSING DAMAGE*; *Bordeaux*, 22 Mont. 254, 74 Am. St. 600. See also, *Allen v. Flood*; *Passaic Print Works*, 44 C. C. A. 426, 105 Fed. 163, 62 L. R. A. 673-746, ext. n. See 67 Cent. L. J. 23-28.

Conferring jurisdiction on federal courts by contrivances; allowed in some cases. Dickerman, 176 U. S. 181.

Declarations of counsel bind the client.

Mahan; *Oscanyan*: 41.

MAHASKA v. INGALLS: L.C. 213d.

MAHER v. S.: L.C. 255.

MAHONEY v. S. (1904), 33 Ind. Ap. 655,

72 N. E. 151, 104 Am. St. 276, n.

Cited, § 137, Gr. & Rud. (courts have inherent power to punish contempts).

MAHONING E. B. v. DE PASCALE

(1904), 70 O. 179, 65 L. R. A. 860.

Cited, § 313, Gr. & Rud. (words of provocation may mitigate but not defeat damages).

MAIL: Offences against. *McClain*, C. L.; *Bouv. Dic.*; *Schoul. Bailm.* (postmaster).

MAILING: *McClain*, C. L. 432-437.

MAINTENANCE: See *CHAMPERTY*; *BARRATRY*; Gr. Pub. Pol. 395-419.

Champerty, maintenance and barratry; policy and history of the law of these crimes considered and explained. The law of maintenance is intended only to prevent the interference by suit of strangers having no interest in the litigation, and standing in no relation of duty to the suitor.

Thalhimer v. Brinckerhoff (1824), 3 Cow. 623, 20 Johns. 380, 15 Am. Dec. 309-322, ext. n.; 3 Gr. Ev. 180; *Brown*, 21 Or. 260, 28 Am. St. 752, n., 14 L. R. A. 745 (champerty); *Roberts v. Yancey* (1893), 94 Ky. 243, 42 Am. St. 357, n. (attorney assignee of a note to prosecute, pay costs and part of recovery, is); 2 Lead. Eq. Cas. 1633; *Ryall*: 397; 2 Pars. Conts. 891; 2 Chit. 996; *Ans.* 186 (rules); 2 Sto. Eq. 1039, 1048-1050, Gr. Pub. Pol. 403; 2 Bish. C. L. 128; 3 Gr. Ev. 180-182; 2 Benj. Sales, 816; cases; *Hamilton*, 67 Vt. 233, 48 Am. St. 811; *Davies*, 78 Wis. 334, 10 L. R. A. 190, n.; *Gilman*, 87 Ala. 691, 4 L. R. A. 113, n. Attorney's champertous contracts. *Mech. Ag.* 845-847; *In pari delicto*, etc.: 2 Bish. C. L. 131; *Manning v. Sprague* (1888), 148 Mass. 18, 12 Am. St. 508, n.; *Roberts*, *supra*; *Ackert*, 131 Mass. 436, *Huff & W.* Conts. 354. Collateral champerty as a defense. *Pa. Co. v. Lombardo* (1892), 49 Ohio, 1, 14 L. R. A. 785, n. Pleading of, when essential. *Percy Min. Co.* 22 Colo. 233; *Court-right*, 13 Fed. 317.

Attorney's contract for one-half of alimony is champertous and he may be sued for retaining it without previous demand. *Jordan*, 62 Mich. 170, 4 Am. St. 836.

A right of action could not be assigned at common law. This rule has been very generally superseded at law, and never prevailed in equity. See *SUBROGATION*; *ASSIGNMENTS*; *Grain*; *Gradwohl*. Part of

Maintenance.—

a cause of action cannot be transferred. But see *Grain*; *Gradwohl*.

Generally: 3 Gr. Ev. 180-183; Weeks, Att'y, 87; 2 Bouv. Dic. 292; And. Dic.; Gr. Pub. Pol. 395-419; 2 Chit. Conts. 996-998; 1 Add. 256, 257; Ans. 186; Whart. 421-429. Contracts for, illegal. § 92, Hughes' Conts.

Conveyance of land in adverse possession of another is void. Gr. Pub. Pol. 499; In part delicto, etc.; 2 Bish. C. L. 137; 2 Benj. Sales, 816; cases; Kleber, Sales.

Champerty and maintenance. 2 Bish. C. L. 121-140; 3 Gr. Ev. 180-183. Barratry. 3 Gr. Ev. 66, 67; 3 Encyc. Pl. & Pr. 367-372. Are repressed for public policy. 1 Bish. C. L. 541, 2 id. 63-69; 2 Bish. Cr. Proc. 98-103, 154-156; S. v. Chitty (barratry); Ingersoll, 117 Tenn. 263, 119 Am. St. 1003-1041 ext. n. (attorneys' contracts).

MALACRY v. SOPEL (1836), 3 Bing. N. C. 371 (32 E. C. L. R.), 3 Scott, 725 2 Hodges, 217, Ames, Cas. Torts, 627, Bigl. L. C. Torts, 42-59, 2 Add. Torts, 1137, 2 Kent, 17, Mews' E. C. L., Cool. Torts, Bish., New. Def., 4 Suth. Dam. 1223.

Slander of title; remedies. Gore, sub DEFAMATION; MALICIOUS ACTS.

MALA FIDES PRACTICE: Contempts. See CONTEMPTS; Graver: 103; Ferguson: 264; Brown, *Ex parte*; Kingston's Case; Bro. Max. 329, n. 342. Causing damages, actionable. Ferguson: 264; Graver: 103; West v. Smallwood.

Fictitious suits. S. v. Baughman: 268; Watkins v. S.: 269; Ferguson: 264; Bro. Max. 339.

False and sham pleading vitiates proceedings. Graver; Ferguson; Borden: 267; Rensberger v. Britton.

MALA PROHIBITA: Evil because prohibited. Bouv. Dic.

MALCOM v. SPOOR (1847), 12 Met. 279, 46 Am. Dec. 675, Bigl. L. C. Torts, 378, ext. n.

Trespassers ab initio. Lamb v. Day; Barrett v. White; Six Carpenters' Case. Putting a drunken person in charge of goods levied upon constitutes the officer a trespasser ab initio. Malcom v. Spoor; Woods v. Graves.

MALEDICTA EXPOSITIO (OR INTERPRETATIO CORRODIT VISCERA) quæ corrumpit textum: It is a cursed construction which corrupts the text. Bro. Max. 622. See CONSTRUCTION; *Benedicta*, etc.; *Viperina*, etc.; *Glossa viperina*, etc.; *Maledicta glossa*; Bro. Max. 555; Russell v. Shurtlett; Rensberger v. Britton; *Ut res magis valeat quam pereat*; 67 Cent. L. J. 101, citing *Standard Oil Case*.

MALEDICTA INTERPRETATIO QUÆ CORRODIT VISCERA TEXTUM: It is a cursed interpretation that corrupts the text. See ABSURDITY; *Viperina est expositio*, etc. 1 Kent, 462. §§ 79, 102, Gr. & Rud.

MALFEASANCE AND NONFEASANCE: In office. 2 Bish. Cr. Proc. 819-836, Bouv. Dic., And. Dic. See EXTORTION; CRIMES.

MALICE: As an element in crime. *Actus non facit reum*, etc. McClain, C. L. 121; 25 Cyc. 1666-1670.

Act and intent must concur. See INTENT; MOTIVE. Malice is an element in crime generally; however there are exceptions. P. v. Robey.

Criminal negligence supplies malice. R. v. Longbottom; R. v. Lowe; R. v. Hull; C. v. Pierce (1884), 138 Mass. 165, 5 Am. Cr. R. 391 (reckless doctoring). Gross negligence, too. *Magna culpa dolus est*. See Suth. Dam.

Malice.—

Proof of. C. v. York: 197; Hickory v. U. S.: 194; Durrant v. P., 116 Cal. 179, 10 Am. Cr. R. 499:

"Who knows each chord its various tone,
Each spring its various bias?"

System admissible to prove. See SYSTEM. *Defamation; malice as an element; how proved*. Bromage; 1 Wigm. Ev. 404-409. § 277, Gr. & Rud.; P. v. Rogers: 198.

MALICIOUS ABUSE OF PROCESS: Grainger v. Hill; 4 Suth. Dam. 1106, 1107; Nix.

Absence of jurisdiction; effect of. Allstock, 104 Va. 565, 2 L. R. A. (N. S.) 1100-1108. See FALSE IMPRISONMENT; JUSTIFICATION.

MALICIOUS ACTS CAUSING DAMAGE: *Concealing the condition of premises let to a tenant is actionable*. Cesar v. Karutz (1875), 60 N. Y. 229, 19 Am. Rep. 184, Busw. Pers. Inj. 135; Smith v. Marrable ("Bug Case"); Pasley: 375. Hughes' Proc.; § 304, Gr. & Rud.

Malicious acts causing damage—litigation—are actionable. Graver: 103; McCordle v. McGlinley; Grainger v. Hill; Borden v. Fitch; § 24, Hughes, Conts.; 1 Add. Torts, 14; *Dixon v. Faucus* (1861), 3 El. & El. 537 (107 E. C. L. R.), 1 Suth. Dam. 56, 85, 241, 355; *Randell v. Trimen* (1856), 37 L. & Eq. 275, 17 C. B. 786 (86 E. C. L. R.); *White v. Madison* (1862), 26 N. Y. 117; *Collen v. Wright* (1857), 7 El. & Bl. 301, 8 id. 647 (92 E. C. L. R.), 40 Eng. L. & Eq. 182, Keener, Sel. Conts. 1134, 2 Rul. Cas. 484, n., Finch, Cas. 822; *Hammond v. Bussey* (1887), 2 Q. B. Div. 79, 84, Beale Cas. Dam. (reviewing *Hadley v. Bazendale* and *Collen v. Wright*), Mews' E. C. L. (what are consequences of wrongful act); 2 Kent, 632, n., Huffc. Ag. 183, 48 Am. St. 916, 2 Add. Torts, 1196, 1198; 2 Sm. Lead. Cas. 393-395, 3 id. 1661, 9th ed., Mech. Ag., Sto., Whart., Bigl. Fraud, 1 Rand. Com. Paper, 378, 1 Pars. Conts., Chit., Bro. Max., 3 Suth. Dam.; *Polhill v. Walter* (1832), 3 Barn. & Adol. 114 (23 E. C. L. R.) 2 Smith, Cas. Torts, 495, Keener, Sel. Conts. 771, sub *Sturdivant*: 410; *Letts v. Kessler* (1896), 54 Ohio St. 73, 40 L. R. A. 177-185, ext. n.; *Kuzniak*, 107 Mich. 444, 61 Am. St. 344, n.; *Bordeaux v. Grecne* (1899), 22 Mont. 254, 74 Am. St. 600. See Mahan v. Brown.

Renunciation of contract, e. g., to arbitrate disputes. Pond, 113 Mass. 114; Beale Cas. Dam.

Enticing to break a contract, actionable. *Lumley v. Gye*; *Allen v. Flood*. Interference with contracts. 3 Page, Conts. 1323-1381. Enticing a husband. *Lynch v. Knight*. Attorneys liable for making false and sham inducements. See ATTORNEYS. Conspiracies for the purpose of impeding, hindering, obstructing and defeating the due course of justice. §§ 1977-1980, R. S. U. S.; Ferguson: 264.

Defamation from false pleadings not actionable. *Gore v. Condon* (1898), 87 Md. 368, 67 Am. St. 352, n., 40 L. R. A. 382.

Building a high fence for spite, to shut out light and air, is actionable. *Rideout v. Knox* (1889), 148 Mass. 368, 12 Am. St. 560, 2 L. R. A. 81, Ames, Cas. Torts, 726, Myer, Vested Rights, 286, 62 L. R. A. 686, 67 Cent. L. J. 23-28 (malice an element).

Legal right exercised for spite is not actionable. *Rideout*; Mahan; 192 U. S. 311; cases; Fisher, 137 Cal. 39, 92 Am. St. 77; cases. *Sic utere tuo*, etc.

Malicious exercise of legal rights is no wrong. *Guethler*, 26 Ind. Ap. 587, 84 Am. St. 313.

Malicious Acts.—

Bad motive, when an element. Passaic Works, 44 C. C. A. 426, 105 Fed. 163, 62 L. R. A. 673-746, ext. n.; Allen v. Flood, 195 U. S. 204, 192 U. S. 311; cases, citing Dering. See **MOTIVE**.

Counsel fees, when recoverable. Day v. Woodworth; Beale Cas. Dam.; Merest v. Hervey.

MALICIOUS ATTACHMENTS: Trapnall. See **MALICIOUS ACTS**; 2 Suth. Dam. 514.

MALICIOUS MISCHIEF: S. v. Robinson (1832), 3 Dev. Bat. L. (N. C.) 130, 32 Am. Dec. 661-671, 4 Crim. Def. 465, 1 Bish. C. L. 569, 2 id. 935, 996, Bish. Stat. Crimes, 1094-1118, 12 Crim. Law Mag. 377, 405, 4 Crim. Def. 465-498; cases; 1 Bish. Cr. Proc. 628, 2 id. 837-850; Bouv. Dic.; 6 Am. Crim. Rep. 416 (personal property); McClain, C. L., 811-835; 25 Cyc. 1671-1686.

MALICIOUS PROSECUTION: Munns v. Dupont (1811), appendix to 2 Brown (Pa.) 42, 3 Wash. C. C. 31, 1 Am. Lead. Cas. 240-280, n.; Ravenga, 3 Barn. & Cress. 693-698, (9 E. C. L. R.), 26 R. R. 521, 16 Rul. Cas. 742-757, ext. n.; cases, Grainger; Bigl. Lead. Cas. Torts; cases; Suth. Dam. 1234-1240, Cool. Torts, 180-190, Bish. Torts, 218-250; Jackson, 47 Kan. 396, 27 Am. St. 300, n.; Tryon, 112 Mich. 338, 67 Am. St. 398-427, ext. n.; Blair, 170; Tiede, Pol. Power 18; 2 Bouv. Dic. 296-299; Page, 111 Ga. 73, 78 Am. St. 144 (Partnership may be liable); Mews' E. C. L.; 26 Cyc. 1-120.

Privileged proceedings by those in command. Bro. Max, 209. *Abuse of legal process is actionable.* Executio juris, etc.; Bro. Max.; Grainger; Suth. Dam. 514.

✓ *Advice of counsel, when a defense.* King, 131 Wis. 575, 120 Am. St. 1063-1070.

Probable cause; acquittal or discharge; what a sufficient. Bekkeland, 96 Tex. 255, 64 L. R. A. 474-491, ext. n. *Termination of action.* Graves, 104 Va. 372, 2 L. R. A. (N. S.) 927-954, ext. n.

One making an affidavit for arrest, who the facts sworn to constitute no crime, is not liable for false imprisonment. Whaley, 62 S. C. 91, 56 L. R. A. 649; cases, stating West v. Smallwood. See **FALSE IMPRISONMENT**; Bigl. Lead. Cas. Torts.

Damages; distress of mind. Elam v. Lee (1902), 116 Ia. 289, 93 Am. St. 242, n. *Malicious attachment; mental suffering caused by, actionable.* Friel v. Plume (1898), 69 N. W. 498, 76 Am. St. 190, n., stating Fay v. Parker (exemplary damages). See **DAMAGES**.

MALLAN v. MAY: L. C. 373.

MALLINCKRODT CHEMICAL WORKS v. Nemlich: L. C. 12a.

✓ *Error in sustaining a general demurrer saves itself.* It need not be objected nor excepted to. Such error is available from the mandatory record; the statutory record is useless in such a case. See Roden: 12b; Missouri; Chitty; Rice v. Travis. The *coram non judice* proceedings need not be excepted to. Harkness: 152; cases.

✓ *Legal conclusions are surplusage and void ab initio.* They are not a matter for alder; they cannot be aided by a denial, nor by pleading over. "The allegation of a conclusion of law raises no issue, need not be denied, and its truth is not admitted to the complaint containing it." Loc. cit. 397, Institute, 87 N. Y. 250, S. P., U. S. v. Cruikshank: 232.

A pleader pleads at his peril; he cannot cast the *onus* upon his adversary, to

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move to make more certain or definite, or to demur, if any matter of substance is omitted. *Verba fortius*; Dovaston: 217; Clark, 97 N. Y. 370. Facts, not legal conclusions, must be pleaded. Hanford: 86.

Grounds of the general demurrer are directed to the question: Is there a cause of action? Courts that hold that the general demurrer can be waived leave out of consideration requirements to resist objections upon collateral attack, also for *res adjudicata*. §§ 161-260, Gr. & Rud. See R. R. v. Minnesota, 208 U. S. 452 (ground of demurrer waived). Answering over waives a demurrer. Brannock, 200 Mo. 561, 118 Am. St. 695.

Mallinckrodt is discussed in relation to **THEORY**; **VARIANCE** and *Verba fortius*; also in views from **ESTOPPEL** and **COLLATERAL ATTACK**, §§ 171-262, Vol. I.

MALPAS v. LONDON R. R.: Sub Pym: 52.

MALUM NON PRESUMITUR: Evil is not presumed. 4 Coke, 72. See **FRAUD**; *Nemo presumitur*, etc. Justness, honesty, fairness and morality are presumed.

MANAGING AGENT: Who is a. 26 Cyc. 123-124.

MARBY v. SCOTT: See **HUSBAND AND WIFE**.

MANDAMUS: Dane v. Derby (1866), 54 Me. 95, 89 Am. Dec. 722-742, ext. n.; S. v. Gardner (1903), 32 Wash. 550, 98 Am. St. 858 (to sheriff to release exempt property; replevin is not speedy); 2 Dill. Corp. 823-884, 2 Beach, Corp. 1547-1621, 1 Bish. Cr. Proc. 1402-1403; Mech. Pub. Off. 926-982; Stevens, 27 Or. 553, 31 L. R. A. 342-372, ext. n.; Grand Rapids, 105 Mich. 670, 32 L. R. A. 116, n.; Morgan, 114 U. S. 174; 16 Rul. Cas. 758-796, n.; High, Ex. Rem.; 2 Bailey, Jurisdic. 561-895; Hayne, Appeal, 319-328; Brown, Jurisdic., Bouv., And. Dic., 26 Cyc. 125-515.

Demand before suit, when essential. S. v. Spokane R. R., 19 Wash. 518, 67 Am. St., 739, n.

Courts may be made to entertain jurisdiction by mandamus and to exercise it. S. v. Morse, 31 Utah 213, 7 L. R. A. (N. S.) 1127, n.

Original jurisdiction of court of last resort in mandamus case. P. v. Chicago, 193 Ill. 507, 58 L. R. A. 833-869, ext. n.

Unconstitutionality of statute as defense against mandamus to compel its enforcement. S. v. Heard, 47 La. Ann. 1679, 47 L. R. A. 512, n.

Parties necessary. Powell, 214 Ill. 475, 105 Am. St. 117, n.

Forms. Foster's Fed. Prac. 1342-1345.

MANDATE: See **BAILMENTS**; **COGES**.

MANDATORY RECORD: See **BEST EVIDENCE**; **DUE PROCESS OF LAW RECORD**.

A constitutional implication. §§ 51, 56, 59, 87-88, 115-118, 136-140, 146, 157, 191, 193, 209, 215, 218, 219, 223, 224, 205-234, 239, 243, 248-249, 269, 274, 292, 297, 311, Gr. & Rud.

Constitutions contemplate it. §§ 56-59, 63, 134, 155-160, 215, id.

The conserving policies depend upon it. §§ 44, 83-123, 175, 210-225, 229, 273, 278, id. Guedel: 74a; De non.

From the conserving policies and the maxims, *Verba fortius*, etc., *De non apparentibus*, etc., *Expressio eorum*, etc., and *Regula pro lege si deficit lex* it should be considered. §§ 199, 223, 224, id.

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The record rule, "What ought to be of record, etc." depends on it. *Planing Co.*: 2d; See *PLACITUM*. §§ 105, 193, 199, 210, 221, 223, 224, 229, 235, 278, *id.* *De non.*

It cannot be waived. §§ 59-61, 76, 108, 111-119, 124, 126, 136, 154, 163, 165, 166, 235, *id.* *De non*; *CODES*.

It cannot be abolished. §§ 51, 126, 146, 154, 274, 292, *id.* See *De non*; *CODES*.

Codes provide for it. §§ 135, 136, 154, 157, 162-163, 207, 275, *id.* *Draper*. See *CODES*.

The *axis of protection.* §§ 70, 108, 111-118, 126, 154, 192-193, 210-225, 239, 311, *id.* *De non*.

Barrier against fraud and oppression. §§ 56-61, 90, 91, 108, 111, 112, 115-119, 127, 157, *id.*

Title to property depends on. §§ 90, 101, 115-119, 124-124b, 126, 201a, 218, 219, 220, 223, *id.*

Generally. §§ 123-124, *id.* The record that shows the right to issue execution; also proves a sale thereunder.

Res adjudicata depends on. §§ 180, 182, 186, 192, 199 *id.*

Necessary to resist collateral attack. §§ 126, 136, 163-170, 186, 199, 229, *id.*

It must show the court's authority to act. §§ 124, 132, 169, 235, *id.* See *JURISDICTION*; *PLEADINGS*.

It must show allegations. § 169 *Gr. & Rud.* See *ALLEGATIONS*; *PLEADINGS*.

Admissions, if any. § 167a, *id.* See *ADMISSIONS*.

Denials. § 169, *id.* See *Dickson v. Cole*: 34; *Munday v. Vail*: 79.

Judicial treatment. *Windsor*: 1. § 235, *id.*

The *coram judice* proceeding. §§ 124, 186, 199, 220, *id.* *De non*.

Blackstone did not make it prominent and impress it. § 17, *id.*

It is from the civil law. §§ 20, 24-26, *id.*

The greatest rule of evidence—the record rule—emanates from it. §§ 88-89, *id.* See "What ought to be of record," etc.

A constitutionalism depends on it. See *CONSERVING POLICIES*; *CONSTITUTIONALISM*.

Attacks upon it. §§ 118, 186, 188, 190, *Gr. & Rud.*

Error appearing upon the mandatory record saves itself without objection or exception. It cannot be waived. *Windsor*: 1. §§ 63, 89, 95, 119, 186, 235, 268, *Gr. & Rud.* *Guedel*: 74a; 2 *Cyc.* 715-716; *Mallinkrodt*: 12a, *supra*.

Where the mandatory record and its matter is abused and disregarded one may retire without making objection or stating exception. § 186, *Gr. & Rud.* *Guedel*: 74a. Except in review of cases from state courts in federal supreme court. *Winona*: §§ 93, 119, *id.*

The *coram judice* proceeding is one not subject to collateral attack. To resist this the mandatory record is provided for. §§ 211-225, *id.* *Draper*.

The *coram non judice* proceeding is one that is subject to collateral attack. The mandatory record will not support it. Such is *Windsor*: 1. Other cases are cited, §§ 124-133, 210-234, *id.*

The mandatory record is interwoven and interlaced with the grounds and rudiments of law. §§ 46-71, *id.* *Draper*.

It is involved in the proposition, that what is not juridically presented cannot be judicially considered. §§ 56-61, 118, 183, *id.*

The citations to *De non apparentibus*, etc., *U. S. v. Cruikshank*, *E. v. Wheatley*, *Moore v. C.*, *McAllister v. Kuhn*, *Windsor v. McVeigh*, and *Verba fortius*, etc. will afford an extended and most instructive lesson relating to the mandatory record

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and its functions. See *CERTAINTY*; *Guedel*: 74a; *THEORY OF THE CASE*; *VARIANCE*; *Verba fortius*.

The position of the mandatory record in American decisions is incomprehensible and besides is pitiable. It reveals to every reflective student the fact that when the philosophy of the law is lost the law is lost; also the frail moorings upon which depend the stability of law, and the bulwarks of a constitutionalism.

Intellects ignorant of the fundamental maxims have been recognized as competent to expound and construe codes and practice acts. What has happened may be learned from observations in relation to Illinois, Missouri, Colorado, Indiana and New York. They have made the progress of students almost impossible; they have made the study of the law repulsive and foreboding; they have made drudges of the members of the legal profession in treadmills; these do not think or reason from fundamentals, but only from cases, what some benighted court has said. It must yet be considered unbelievable that the profession could ever be led to believe that the record or constitutional rule, the mystic and *coram judice* rules had been or could be abolished by codes or practice acts, as manifestly was done in the states above mentioned. See *ABATEMENT*; *CODES*; *CONSTRUCTION*; *PLEADING*; *JURISDICTION*; *PROCEDURE*; *RES ADJUDICATA*; *VARIANCE*; *DEPARTURES*; *DEMURRER*; *COLLATERAL ATTACK*; *THEORY OF THE CASE*.

Largely contributing to the dangers that are gathering and the disasters that have come to supreme court reports, are contradictory and puzzling sections which are cited and referred to in relation to variance. Among these are 1 *Bates Pl., Pr., Parties and Forms*, 511, 512, and 2 *Thomp. Tri.*, §§ 2310, 2311.

The history and functions of the mandatory and of the statutory records have become confused and jumbled. In many cases it appears that the latter record is often substituted for the former in violation of the rule, "What ought to be of record must be proved by record and by the right record." Such disturbances will derange a system of jurisprudence, and will be attended with consequences of far reaching effects.

MANDATORY STATUTES: *Indianapolis*: 223; *Ita lex scripta est*; *Martin*: 246; *Borden*: 267; *Bloom*: 266; *Cooper v. Reynolds*; *De minimis*; *Perez*: 2e. §§ 109, 199, *Hughes' Proc.*

Peremptory language is sometimes construed as directory, e. g., when the statute provides that if a cause is instituted without first giving a cost bond the suit shall be dismissed. Still this statute is satisfied if the bond is filed before objec-

Mandatory Statutes.—

tion is made. From the nature of a subject-matter and of a proceeding a court construes. *May v. Burdett*.

Void often means voidable in construction. A foreign corporation may sue upon a contract after it has complied with local requirements. *Kirven*. An infant must be actually served with process; the ceremony of serving it cannot be waived, as it may be in case of adults. *Galpin*: 63; **ABATEMENT; CODES; THEORY OF THE CASE.**

The establishment and vindication of the conserving principles of procedure are sometimes mandatory, sometimes directory and sometimes constructive. *Bates*: 225; cases.

MANIFESTA PROBATIONE NON IN-
 digent: Manifest things require no proof.
 ✓ 7 *Coke*, 40b. *Res ipsa loquitur*; *Quod constat*, etc.

MANSLAUGHTER: *McClain*, C.L. 335-351; 9 Am. Cr. Rep. 337 (duty to retreat); U. S. v. *Holmes*: cases; *Bouv. Dic.* See **HOMICIDE; MURDER; SELF DEFENSE; CRIMES**. 21 *Cyc.* 734-776.

MARBURY v. MADISON: L.C. 142.

MARINE INSURANCE: See **INSURANCE**. 26 *Cyc.* 538-742.

MARRIAGE; CONTRACTS OF: See *Consensus non concubitus*, etc.; S. v. *Lowell* (1899), 73 *Minn.* 166; 79 *Am. St.* 358-384, ext. n.; **BREACH OF PROMISE**; 2 *Gr. Ev.* 460-464, 2 *Bouv. Dic.* 318-320, 527 (nullity of); *Ans. Conts.* 3, 60, 72, 117, 118, 119, 187, 188; 26 *Cyc.* 821-926.

Founded on nature. Maris et feminae, etc. *Promise of*. 2 *Bouv. Dic.* 774-776.

Common law marriage; what is proof of. *Denison*, 35 *Md.* 361. *Consensus non concubitus facit matrimonium*: Consent, not concubinage, constitutes a valid marriage. *Bro. Max.* 506; *Peck*, 12 *R. I.* 485, 34 *Am. Rep.* 702. Contracts in restraint of, § 94, *Hughes, Conts.*; *Ans. Conts.* 187, 188. Marriage brokerage contract illegal. § 95, *Hughes, Conts.*

What constitutes. 9 *Am. Cr. R.* 412.

Eligibility essential for; a married person cannot be, until freed by divorce. *Barth*, 102 *Ky.* 58, 80 *Am. St.* 335.

Promises "in consideration of marriage" do not include promises to marry. *Short*, 58 *Ind.* 29; *King*, 7 *Mees. & W.* 55, *Bro. Max.* 886.

Strathmore stated: Lady S. was engaged to G., and with his consent conveyed her property to trustees for her separate use. Later B. fought a duel on her account and won her admiration, and then she broke with G. and married B., who did not know of the conveyance, and who sued to recover the property. But he failed, for the reason that she conveyed with the consent of G., then her affianced; otherwise, if with intent to deceive B.

Marital rights; frauds upon. *Strathmore v. Bowes* (1789), 1 *Ves. Jr.* 22, 2 *Brown, C. C.* 345, 30 *Eng. Reprint*, 211, 2 *Cox*, 28, 1 *R. R.* 76, 12 *Rul. Cas.* 757, n., 1 *Lead. Eq. Cas.* (W. & T.) 605-623, 1 *Beach, Eq.* 113, *Cool. Torts*, 600, 601, *Pars. Conts.*, Add., *Bigl. Fraud, Blsph. Eq.*, *Per. Trusts*, 2 *Kent*, 176. *Pasley*: 375. Fraud vitiates marriage contracts. *Bigl. Fraud*, 92-96, 2 *Pom. Eq.* 920; *Dudley*, 76 *Wis.* 567, 8 *L. R. A.* 814; *Murray*, 90 *Ky.* 340, 8 *L. R. A.* 95. Inducing one to marry a debauched girl is actionable. *Kujek, sub Ashby*: 273; or deceiving one of

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the parties as to the wealth of the other. *Piper, sub Ashby*. See *Pasley*. *Ante-mortem* conveyances to defraud wife. *Smith*, 22 *Colo.* 480, 34 *L. R. A.* 49; *Van Houten*; *Colhins*, 98 *Md.* 473, 103 *Am. St.* 408-423, ext. n.

Divorce; cruelty as a ground for. *Morris*, 14 *Cal.* 76, 73 *Am. Dec.* 615-631, ext. n.; *Cooper*, 17 *Mich.* 205, 97 *Am. Dec.* 182; 185, n.; *Palmer*, 45 *Mich.* 150, 40 *Am. Rep.* 461-465, n.; *Robinson*, 68 *N. H.* 600, 49 *Am. St.* 632, 15 *L. R. A.* 121; *Reinhard*, 96 *Wis.* 555, 65 *Am. St.* 66-83, ext. n.

Accusation of adulterous intercourse is cruelty. *Carpenter*, 30 *Kan.* 712, 46 *Am. Rep.* 108-111; *Kelley*, 18 *Nev.* 49, 51 *Am. Rep.* 732-737, n.

Condonation as an element. *Nogess*, 7 *Tex.* 538, 58 *Am. Dec.* 78-83, n., 2 *Add. Torts*, 1248, 2 *Gr. Ev.* 53; *Bernstein, D. & A.* 3-16, 12 *Rul. Cas.* 783-815.

Drunkenness as a ground for divorce. *Dennils*, 68 *Conn.* 186, 34 *L. R. A.* 449-459, ext. n., 7 *Encyc. Pl. & Pr.* 94.

Right of party obtaining or consenting to divorce to contest its validity. *Karren*, 25 *Utah*, 87, 60 *L. R. A.* 294-308, ext. n.

What amount of blood constitutes a negro. 2 *Am. Cr. Rep.* 637.

A marriage is presumed where the parties, acting in good faith, believed they were married, although there was an impediment, when this has ceased to exist. *Land*, 206 *Ill.* 288, 99 *Am. St.* 171, n. (common-law marriage).

Adultery. *Nichols*, 31 *Vt.* 328, 73 *Am.* 352, 354, n. Allegations of, must be certain. 7 *Encyc. Pl. & Pr.* 72; 2 *Gr. Ev.* 40-59. See **SYSTEM**.

Insanity. *Mohler*, 93 *Iowa*, 273, 34 *L. R. A.* 161-169.

Subsequent to commencement of suit, may be considered. *Harrigan*, 135 *Cal.* 397, 87 *Am. St.* 118.

Desertion. 2 *Kent*, 128; cases, 7 *Encyc. Pl. & Pr.* 76, 95; 21 *Cyc.* 1611; *Herold*, 47 *N. J. Eq.* 210, 9 *L. R. A.* 696, ext. n.

Divorce procedure. 7 *Encyc. Pl. & Pr.* 51-144; *Pfannebecker*, 133 *Pa.* 25, 119 *Am. St.* 608-638, ext. n.

Impotency means inability to copulate and procreate. *Payne*, 40 *Minn.* 467, 24 *Am. St.* 240.

Repetition of offense, after condonation, revives antecedent and forgiven grounds. *Gordon*, 88 *N. C.* 45, 43 *Am. Rep.* 729-732; *Johnson*, 14 *Wend. (N. Y.)* 637; *Shackleton*, 48 *N. J. Eq.* 364, 33 *Cent. L. J.* 91, n.

Does not extend to causes unknown at the time of condonation. *Morrison*, 142 *Mass.* 361, 56 *Am. Rep.* 688-692.

Suit for alimony after decree of divorce. *Downey*, 98 *Ala.* 373, 21 *L. R. A.* 677-680, n.; *Harding*, 144 *Ill.* 558, 21 *L. R. A.* 310; cases (allowance of, generally). How affected by subsequent adultery of wife. *Kinzy*, 115 *Mo.* 496, 20 *L. R. A.* 222, n.; *Cole*, 142 *Ill.* 19, 19 *L. R. A.* 811, n.

Maintenance; right to sue for, independent of a divorce suit. *Popejoy* (1899), 26 *Colo.* 32, 77 *Am. St.* 222-245, ext. n.; 21 *Cyc.* 1592.

Remarriage, when forbidden by statute; effect. *Ovitt v. Smith* (1896), 68 *Vt.* 35, 35 *L. R. A.* 223.

Or order of court. S. v. *Shattuck* (1897), 69 *Vt.* 403, 60 *Am. St.* 936-947, ext. n.; *Crawford v. S.* (1895), 73 *Miss.* 172, 35 *L. R. A.* 224.

Alimony and its allowance. See **DIVORCE**; *Lea*, 104 *N. C.* 603, 17 *Am. St.* 692, n.,

Marriage.—

1 Encyc. Pl. & Pr. 407-457; Methvin (1854), 15 Ga. 97, 60 Am. Dec. 664-682, ext. n.

Is a lien on land. Gaston, 114 Cal. 542, 55 Am. St. 86. *Allowance to husband.* Greene (1896), 49 Neb. 546, 34 L. R. A. 110, n.

Contempt proceedings to compel payment of alimony. Staples, 87 Wis. 592, 24 L. R. A. 433-444; Barclay, 184 Ill. 375, 51 L. R. A. 351, n.

Evidence; proof of marriage; what sufficient. Appeal of Reading Fire Ins., 113 Pa. 204, 57 Am. Rep. 448-463, ext. n.; S. v. Hodgskins (1841), 19 Me. 155, 36 Am. Dec. 742-751, n.; Cameron v. S. (1848), 14 Ala. 546, 48 Am. Dec. 111-117, n. (evidence of, in criminal cases); Halbrook v. S. (1879), 34 Ark. 511, 36 Am. Rep. 17-24, n. (bigamy case); Williams, 21 R. I. 401, 79 Am. St. 809-812, n. (from cohabitation and repute).

Divorce, grounds for; self-abuse, practiced in wife's presence is no cause for. W. v. W. (1886), 141 Mass. 495, 55 Am. Rep. 491, 492.

Refusal of marital intercourse. Fritts, (1891), 138 Ill. 486, 14 L. R. A. 685, n.

Connivance at divorce; effect. Wilson, 154 Mass. 194, 12 L. R. A. 524, n., 7 Encyc. Pl. & Pr. 95. "A cause is never concluded against the judge" in divorce cases. 7 Encyc. Pl. & Pr. 88. See rationale in S. v. Baughman: 268; *Fabula non judicium*; California: 270.

Conviction and sentence for crime; effect upon the marital relation. S. v. Duket (1895), 90 Wis. 272, 31 L. R. A. 515, ext. n.

Non residents; effect of, against. Felt, 59 N. J. Eq. 606, 83 Am. St. 612-628, n.

Separation agreements void. Palmer (1903), 26 Utah, 31, 99 Am. St. 820, n. See HUSBAND AND WIFE; 15 Cyc. 1592.

Burden of proof relating to marriage in cases of a second marriage. Pittinger, 28 Colo. 308, 89 Am. St. 193-206, ext. n. (matrimony is presumed; morality, not immorality; marriage, not concubinage; legitimacy, not bastardy, is presumed); 89 Am. Dec. 198.

Criminal law relating to. McClain, C. L. 1073-1076, q. v.

Void marriage; effect of. Deeds, 6 Idaho, 317, 96 Am. St. 263-277, ext. n.

MARRIED WOMEN: Contracts of. § 64, Hughes, Conts.; Manby v. Scott; Smith, Lead. Cas.; 2 Beach, Conts., 1250-1343, Smith, 328-355, Whart. 76-92 (able resume), 2 Bouv. Dic. 320-328; 2 Page, 911-936. See HUSBAND AND WIFE.

Can be agent for her husband from necessity. Ans. 335. By authority, express or implied. Ans. 334, 357, 358. Effect of marriage on contract made by wife *dum sola*. Ans. 235.

Conveyances to wife by husband. Hulme v. Tenant (1778), 1 Brown, Ch. Rep. 16, 1 Dick. 560, 28 Eng. Reprint, 958, 1 Lead. Eq. Cas. 679-772 (wife's separate property); Leake.

As to the enforceability of contracts of married women outside of the state in which they were legally made. Williams, 52 La. Ann. 1417, 50 L. R. A. 816, ext. n.

Generally at common law they cannot contract, but a wife may bind her separate estate; wife may contract relating to her own personal services, although she may have to join with her husband if she sues. Cannot bind a future-acquired estate. Divorce, but not mere separation, creates independent liability. *Cessante ratione,*

Married Women.—

etc. All her ante-nuptial rights pass to the husband—merge in the marriage. A husband is liable for a wife's torts. C. v. Neal. Wife may bind husband as agent for necessities. Husband may be wife's agent wherever she may contract. Husband cannot escape his duty by his own wrong. Wife may alienate her rights to necessities by her own wrong, or by living apart from her husband upon an allowance. Estoppel does not apply to a married woman; but see Bisph. Eq. 293: cases; Bigl. Estop.; Borkenhagen: 81; Mitchell v. Reed. Separation contracts invalid. Husband cannot contract with wife.

Contracts of married women under late statutes. Kriz, 119 Wis. 105. See HUSBAND AND WIFE. Contracts of women, like the Sunday law, depends on a statute.

Separate estate of wife. Equity will protect under special circumstances without reference to divorce. Dority (1903), 96 Tex. 215, 60 L. R. A. 941; 21 Cyc. 1537.

Power of attorney from married women. Security Savings Bank v. Smith (1900), 38 Or. 72, 62 Pac. 794, 84 Am. St. 756-772, ext. n.

Conflict of laws as affecting the rights and obligations of married women. Locke v. McPherson (1901), 163 Mo. 493, 63 S. W. 726, 85 Am. St. 546-578; ext. n.

Criminal liability. McClain, C. L. 145-148; C. v. Neal. Larceny of property of, by one who marries to get possession of it. Hunt v. S., 72 Ark. 241, 65 L. R. A. 71.

MARRIOT (OR MARRIOTT) v. HAMP-
ton (1797), 7 Term Rep. (D. & E.) 269, 4 R. R. 439, 2 Sm. L. C. 436-458; 11th ed. (reviews English cases), 2 Esp. 545, Keener, Quasi. Conts. 411-413, Suth. Dam.; Mews' E. C. L. 1329, Bro. Max. 256, 332, 1 Herm. Estop. 119, 2 Kent, 491, Van Fleet, Coll. Att. 569, Chit. Conts.; Beach, Ans. 367, Bish. 272, 2 Whart. 370, Dill. Corp., Wh. Ev., 1 Van Fleet, For. Adj. 189, 2 Gr. Ev. 221, Brown, Jurisdic.

Cited, §§ 43, 120, 122, 133, Hughes' Proc.

Marriot stated: M. received a suit of clothes of H. and got a receipted bill, which H. afterward denied, and sued M. who had lost his receipt; consequently H. recovered, as the plea of payment cast the burden of proof upon M. (McKyring: 33; Cothran). After paying the judgment he found his receipt, and then sued H. for the last payment; but here he failed again, for technical reasons of *res adjudicata*.

Interest respublice ut sit finis litium; Sayre, 33 W. Va. 553; Lake, 38 Fla. 53, 56 Am. St. 159, 164, n.; Vick, 49 Ark. 70, 4 Am. St. 26; Tucker, 20 R. I. 477, 78 Am. St. 893 (a judgment is conclusive of all that might have been heard); People's Bank, 175 Mass. 131, 78 Am. St. 481. See *Res adjudicata*; Perez: 2e.

Upon the facts of this case, the view is open that, after H. was first paid there was no cause of action, no wrong; he might have been defeated from this view. *Fabula non judicium; Leges non verbis,* etc.; Graver: 103.

MARSHALL: Great cases of; Marshall's Constitutional Decisions. See Cohens v. Va.: 244; M'Culloch: 147; Marbury: 142; Dartmouth College Case; Brown v. Md.; Craig v. Missouri; Worcester v. Georgia. See §§ 12, 20, Gr. & Rud.

MARSHALLING OF ASSETS: Bouv.;

And. Dic. Doctrines. of. Aldrich v. Cooper (1802), 8 Vesey, 382, 32 Eng. Reprint, 402, 2 Lead. Eq. Cas. 228-353, 7 R. R. 86, 18 Rul. Cas. 198, n.; cases: cited, 1 Suth. Dam. 192, and in equity works; Durham v. Lancaster, with Aldrich v. Cooper; Silk v. Prime (1768), 1 Brown, C. C. 138, n., 1 Dick. 384, 21 Eng. Reprint, 318, 2 Lead. Eq. Cas. 353-429, 4 Gray, Cas. Prop. 775; cited, equity works and trusts; State Bank v. Roche, (1895), 35 Fla. 357, 17 So. 652, 2 Am. & Eng. Eq. Cas. 414-435, ext. n.; 26 Cyc. 927-939.

MARSH V. LEE (1670), 2 Vent. 337-339. 1 Lead. Eq. Cas. 337-380, ext. n., 18 Rul. Cas. 523, 3 Add. Conts. 1038, 2 Wash. R. P. 150, Pom. Eq. Tackling; doctrine of Marsh, § 330, Hughes' Proc.

MARSHALLSEA CASE (1613), 10 Coke, 70, 25 Am. Rep. 694, Bro. Max. 93, Bigl. Lead. Cas. Torts, 278, Cool. 487, Bish. 132, 772, 783, 1 Beach, Pub. Corp. 205; Lange: 159; Brown, Jurisdic.; Piper v. Pearson: 114 (rule stated); *Factum*.

MARTIAL LAW: Milligan's Case; Luther v. Borden. See CONSTITUTIONAL LAW; Treason Trials at Indianapolis; C. v. Shortall (1903), 206 Pa. 165, 98 Am. St. 759-776, 65 L. R. A. 193-209, ext. n. (where there is no actual war).

Governor's prerogative to declare and exercise incidents of, Moyer, *In re*, 35 Colo. 159, 117 Am. St. 189.

Court martial, Bouv. Dic. (Military law). Right to counsel in. S. v. Crosby (1897), 24 Nev. 115, 77 Am. St. 786, n.

MARTIN V. EVANS (1897), 85 Md. 8, 60 Am. St. 292, 36 L. R. A. 218: cases. §§ 120, 130, Hughes' Proc.

Opinions of court can neither augment nor diminish the mandatory record, Cohens: 244; Horan: 85. See Rensberger v. Britton; *Dictum*.

Res adjudicata defenses disfavored in construing a record, Martin; Langmead.

MARTIN V. HUNTER'S LESSEE: L. C. 246.

MARTIN V. PORTER (1839), 5 Mees. & W. 351, 2 Horn. & Hurl. 70, 17 Rul. Cas. 841, 10 Mor. Min. Rep., Sedgk. Lead. Cas. Dam. 677, 2 Sedgk. 501, Suth., 3 Pars. Conts. 213, 1 Add. Torts, 458, Mews' E. C. L. 1233; Maye, 23 Cal. 306, 10 Mor. Min. Rep. 101; Dwight, 132 N. Y. 199, 15 L. R. A. 612, 28 Am. St. 563, n.; 64 N. H. 512, 10 Am. St. 429.

Measure of damages for mining minerals; what the trespasser is allowed, Martin; Wood, 5 Q. B. 440, 5 Scott, 204, 10 Mor. Min. Rep. 77, 3 Suth. Dam. 1020, 1127, 1 Add. Torts, 458; Forsyth; Foote, 54 N. H. 490, 20 Am. Rep. 151, citing Martin; 3 Suth. Dam. 1090 (trespass for cutting trees); Beede, 64 N. H. 510, 10 Am. St. 426 (stating Foote).

A trespasser cannot plead the benefit of his trespass, Bull; *Nullus commodum*, etc., Donovan, 187 Ill. 28, 79 Am. St. 206. Damages against is allowed from the beginning. 4 Suth. Dam. 1106, 1107.

MARK V. HANTHORN: L. C. 126.

MARZETTI V. WILLIAMS (1830), 1 Barn. & Adol. 415 (20 E. C. L. R.), 35 R. R. 329, Sedgk. Lead. Cas. Dam. 453, 5 Rul. Cas., 9 Mews' E. C. L. 1688; Zane, Banks, 20, 3 Kent, 116, 2 Gr. Ev. 146, 584, Cool. Torts, Rand. Com. Paper, Suth. Dam.; Webb, sub Ashby: 273; Bish. Torts, Chit. Conts., 2 Beach Conts. 679; James Co., 105 Tenn. 1, 80 Am. St. 856-875, ext. n.; 13 Cyc. 15 (Damages).

Banks are liable to the depositor for re-

Marzetti.—

fusing to pay his checks, but not to the drawee. A check is not an assignment of the deposit *pro tanto*. Bank is not liable to drawee before acceptance of the check.

See Grain; Rolin v. Steward (1854), 14 C. B. 459 (78 E. C. L. R.), Mews' E. C. L. (substantial damages recoverable).

MASSACHUSETTS: The reports of this state are widely cited. It seems well to mention them as next follows. The student will do well to become familiar with the reports of England, the Federal, Massachusetts, New York, Pennsylvania and Illinois. How to find the law involves a knowledge of legal bibliography; this will require some serious attention which should be given early.

Massachusetts Reports: Seventeen volumes. *Pickering* (twenty-four volumes): 18 to 41.

Metcalf (thirteen volumes): 42 to 54.

Cushing (twelve volumes): 55 to 66.

Gray (sixteen volumes): 67 to 82.

Allen (fourteen volumes): 83 to 96.

97 Massachusetts to 195 (in 1908).

MASSEY V. GORTON: Sub CREDITORS' BILLS.

MASTER AND SERVANT: See Mech. Ag.; 2 Bouv. Dic. 331-336; Labatt, Master and Servant (3 vols., 1904); Pleading and Practice, id. 850-869; Huffc. Ag.; Reinh.; 9 Mews' E. C. L. 794-958; 26 Cyc. 927-1587. See also AGENCY; M'Manus. *Liability of master for personal injury to servant*, Roberts, sub M'Manus: cases. Volenti.

Employers' Liability Act, Huffc. Ag., Reinh., Tiff., Labatt, Mas. & Ser.

Servant's right to medical attention. The Kenilworth, 144 Fed. 376, 4 L. R. A. (N. S.) 49-80, ext. n.

MASTER (OR MASTERS) V. MILLER

(1791), 2 H. Bl. 141, 4 T. R. (D. & E.) 320, 5 id. 637, Anst. 225, 1 Sm. L. C. 1277-1319, 8th ed., 767-809, 11th ed. (reviews English cases); 2 Rul. Cas. 669-695: cases; id. 6, 615, 2 R. R. 399, cited, Bish. Conts., Add., Chit., Pars., Clark, Ham., Leake, Whart., Laws., Sto., 1 Gr. Ev. 564-568a (rules stated), Bro. Max. 154-157 (rationale of rule), Bouv. Dic., Rand. Com. Pap., Daniel, Dev. Deeds, 456-463 (Pigot's Case), Mews' E. C. L.; Bigl. Fraud; Jones, Ev.; Gillett, Crim. Law, 445, Thayer, Ev. 818, 174 Pa. 176, 35 L. R. A. 476, 86 Am. St. 78-134, ext. n., 92 Am. St. 52, n. (detriment or benefit not weighed), 2 Cyc. Law & Proc. (1901), 122 pages; 4 Wigm. Ev. 2525 (presumptions). Cited, pp. 44, 45; §§ 258, 315, 317, Hughes' Proc. *Omnia presumuntur Aldous v. Cornwell (or Cornwall)* (1868), 9 B. & S. 607, 3 L. R. Q. B. 573, 27 L. J. Q. B. 201, Thayer, Cas. Ev. 818, 2 Mews' E. C. L. 1624, 6 id. 592, Shir. L. C., Rand. Com. Pap., Danl. Nego. Insts., Jones, Construc. Conts., Bro. Max., Whart. Ev. 1 Best, Ev. 229, Jones, Ev. 574. § 315, Hughes' Proc.

Pigot's Case (1616), vol. 6, pt. XI, Coke, 26b, n., Thayer, Ev. 818, Mews' E. C. L., Jones, Construc. 291-294, Bigl. Fraud, 3 Wash. R. P., 1 Whart. Ev. 622, Jones, Ev. 572, 1 Best, Ev. 229 (the custodian of a document must preserve it at his peril; to permit an alteration bars the right to recover upon it). *Contra*, Pigot's Case, which has been denied. § 315, Hughes' Proc.

Woodworth v. Bank of America (1821), 16 Johns. 391 (reversing 18 Johns. 315), 10 Am. Dec. 239-273, ext. n., Jones, Ev. 573, § 315, Hughes' Proc.

Master v. Miller.—

Burgess v. Blake (1900), 128 Ala. 105, 28 So. 963, 86 Am. St. 78-134, ext. n.

Prim v. Hammel (1902), 134 Ala. 652, 32 So. 1006, 92 Am. St. 52, n. (detriment or benefit to the maker is not considered).

Rule: Generally one must preserve a document entrusted to him to evince his rights from alteration or spoliation. If he allows it to be changed he can claim nothing under it. Exceptions to this rule are recognized in some jurisdictions. Note, *Smith, Leading Cases. Statutes sometimes modify it.*

The above rule is an effect of applying the maxims *Volenti non fit injuria*, *Nullus commodum capere potest de injuria sua propria*, and *Omnia presumuntur contra spoliatores*; *Armory v. Delamire*: 180. § 318, Hughes' Proc.

The rule in *Pigot's Case* enforces good faith and insures protection, and applies with strictness a salutary rule which is expressed in *Armory* and in *Bull*, i. e., he who offends the law can claim no protection under the law. The rule in *Pigot's Case* nestles among great maxims and cases. They involve morality and the conserving principles.

It has been held that, if an alteration is made by a stranger without the consent or knowledge of the payee or grantee, this will not vitiate. Notes, *Smith, Lead. Cas.* The rule in *Pigot's Case* is the general one. See able resume of rules, *Jones, Ev.* 572-581.

Filling blanks in commercial paper. *Angle Case, ante*; *C. v. Kane*: 183; cases.

Insertion of word "gold" before dollars is material. *Foxworthy* (1902), 62 L. R. A. 393.

Generally: Notes, *Smith L. C.*; 3 Page, *Conts.* 1511-1543.

MASTER IN CHANCERY: 2 Bouv. Dic. 336-338.

MATERIALITY OF FALSE OATH: Essential to perjury. *McClain, C. L.* 861, 866. How alleged. *Id.* 878, 879. How proved. *Id.* 889. Pleadings must show materiality. They can not be waived.

MATTHEWS V. S.: L. C. 193.

MATURIORA SUNT VOTA MULIERUM quam virorum: The wishes of women are of quicker growth than those of men, i. e., women arrive at maturity earlier than men. 6 Coke, 71a; *Bracton*, 86b. See INFANTS.

MAXIME ITA DICTA QUIA MAXIMA est ejus dignitas et certissima auctoritas, atque quod maxime omnibus probetur: A maxim is so called because its dignity is chiefest, and its authority the most certain, and because universally approved by all. Coke, *Litt.* 11. §§ 73, 78, 211, Gr. & Rud.

MAXIMS: Defence of. §§ 10, 12, 118, 123, 134, Gr. & Rud.

Make constitutions. §§ 14, 15, 16, 20, 21, 31-44, 79-82, 267, 268, *id.*

Universal application. §§ 38, 45, 77, 78, 118, 135, 157, 266, *id.*

Condensed good sense of nations. §§ 75, 79, *id.*

Mold codes. § 151, *id.*; *Verba fortius; Frustra probatur.* See CODES; GENERALITIES. §§ 118, 152, *id.*

Are unwritten constitution. §§ 123, 262, 265, 267, 268, *id.* See PRESCRIPTIVE CONSTITUTION.

Attacks upon. §§ 118, 134, 144-149, *id.* *Ram. Judgts.* § 49.

Federalist commended, and is construed by them. §§ 79, 80, 211, *id.*; 64 Cent. L. J. 385, 386.

Maxims.—

Maxims are a chief factor of the law. They are its acorns, roots and heartwood. *Scott v. Ford.* See PRESCRIPTIVE CONSTITUTION; MISSOURI. They are the condensed good sense of nations, and if learned as expressed and comprehended by the Roman they may, figuratively speaking, be called the A B C of the law of continental Europe and of countries descended from them. They are the prescriptive constitution; they give harmony, consistency and fundamental reason to all great charters. Written constitutions can be made alien and hostile to fundamental law if construed without regard to the maxims; by construction, written constitutions could be made harmonious and acceptable in Turkey or Persia. Any constitution can be emasculated by construction. *Cujus est instituere ejus est abrogare.* This is well illustrated in those American states which deny *Frustra probatur quod probatum non relevat* in so many of their decisions. See 2 Thomp. Tri. §§ 2310, 2311; 1 Bates Pl., Prac., Parties and Forms, 511, 512; THEORY OF THE CASE.

The attempt to establish and operate written constitutions without regard to the laws of reason, morals, necessity and fundamental principles is erroneous and most mischievous. The attempt to set up a written constitution above the maxim precepts has made of the latter shaded and withering plants, the extirpation of which opens the way for the wrecking of jurisprudence and the establishment of tribal babels of confusion and bewilderment, as may now be witnessed in several American states where the unwritten constitution is denied, where pleadings and the mandatory record are waived; wherever this is done the ways of arbitrariness are paved. See CODES; CONSTRUCTION; VARIANCE.

From the earliest times the leading fundamental conceptions of the law, its grounds and rudiments have been expressed in maxims—the condensed good sense of nations. In that language which is most exact, which is most scientific and least liable to change, they have been imbedded for thousands of years. And so Glanville, Bracton, Britton, Fleta, Bacon, Coke, Mansfield, Blackstone, Hamilton, Marshall, Kent, Story, Shaw and Field found and cited

Maxims.—

them. Beginning with the year books, they were cited; they then stood for the pages of cases that are now cited and which simply show a particular application of the maxim, as may be instanced in *Armory*: 180.

The question involved is: which is a better authority to cite, *Caveat emptor* or *Pasley, Chandelor, Laidlaw* and the multitudes of other cases it would fill pages to cite?

The old books cited and reasoned from the maxims. From them the law was woven as a fabric. The maxims were the web and woof. The strands unravelled show them. From the year books others came, but all from the same identical parent stock. The old cases and maxims are considered and cited now as ever. They best express and protect fundamental principles; for they are ever ancient and ever new; time writes no furrows upon their all-protecting brows. The "metwand of the common law" is, in other words, the maxims of the law. These cannot be abolished nor expurgated without making fundamental changes in government. The maxims that call for the mandatory record and their cognates are an unwritten constitution. §§ 115-118, 163, Gr. & Rud. The prominent writers who paved the way for attacks upon that record did not understand the conserving principles of procedure, nor the grounds and rudiments of law. Such are the consequences of misunderstanding and disregarding the learning, the admonitions and the guidance of the maxims—the condensed good sense of nations.

Throughout the ages decisions have been made from the maxims as guiding stars. This is well illustrated in *Mitchell* (103 U. S. 64, 65) which was quoted and followed in *Dawson* (89 Mo. App. 250). In these cases *Actus curiæ neminem gravabit* (an act of the court shall prejudice no man) was followed. In these cases as in the year books the maxim was the *datum post* from which all was reasoned. Further illustrations are also found in *S. v. Sheppard* (Mo.) and *Langabier*: 174a (Ill.). See Leading Cases 214 *et seq.*; *Regula pro lege si deficit lex*.

From *Juris præcepta* the law can be written (Title page Broom Maxims). It comes from Ulpian, the Di-

Maxims.—

gest and Blackstone (p. 40). A part of this maxim is *Alterum non ledere*, from which the law of torts is developed, Burdick's Torts, 3, 4. It is one of the tenets in the catechism of the Church of England. Thus is seen a fundamental maxim of morals, religion, of duty and of right, the basic maxim of jurisprudence; accordingly appear the intensity, the morality and the usefulness of law. This maxim embraces *Sic utere tuo ut alienum non ladas*, Burdick's Torts, 29. These maxims are closely related to those that support the maxims of equity and the canons of construction. See Chap. X (Leading Subjects Epitomized), Gr. & Rud.

Tables of maxims are found in 2 Bouv. Dic., Taylor's Law Glossary, 16 Cyc. 133-148 (Equity), Broom's Maxims, Hughes' Procedure, 9 Mews' E. C. L. 958-969, Index: L. R. A. Reports.

MAY v. BURDETT (1846), 9 Q. B. 101, 16 Q. B. 64, 9 Adol. & El. 100 (58 E. C. L. R.), 1 Thomp. Neg. 174, ext. n., Bigl. L. C. Torts, 478, 2 Smith, Cas. Torts, 401, 3 Rul. Cas. 108, n., Mews' E. C. L.; Clowdis, 118 Cal. 315, 62 Am. St. 238, n., Cool. Torts, Bish., Moak, Add., Wood, Nuls., Whart. Neg., Shear. Neg., Busw. Pers. Inj., 2 Wat. Tres., Bro. Max. § 348, Hughes' Proc.

Carrier liable for passenger's dog biting another passenger. L. C. 357: cases.

May is a widely cited case in works on torts, trespass, negligence and nuisance.

May stated: B.'s monkey attacked and bit Mrs. M., who sued B. and recovered, because a monkey is savage by nature (*feræ naturæ*). "A dog has his first bite but a bear has not." Ex. v. 28, 29, ch. 21.

The owner of a horse is liable for damage he does when he is out of place. *Hardiman*, 172 Mass. 411, 78 Am. St. 292, n., 107 Am. St. 260.

Animals; liability of owner for keeping ferocious. Knowledge; scienter, when an element. Van Leuven: 14. See ANIMALS; Tiede. Pol. Power. *Sic utere tuo ut alienum non ladas*; Fletcher; Scott v. Shepherd; 107 Am. St. 260.

The law is reasoned from the nature of a subject-matter. See MANDATORY STATUTES.

MAYHEM: McClain C. L. 432-437, 2 Bish. Cr. Proc. 850a-859, And. Dic. Intent; must be malicious. 8 Am. Cr. R. 543.

MAYOR v. BRENSINGER (1899), 180 Ill. 110, 121. § 125, Gr. & Rud. (Judgment includes record).

McAFEE v. REYNOLDS (1891), 130 Ind. 33, 18 L. R. A. 211-215: cases.

Where the record presents the facts in a civil case, and there is nothing to be tried, a supreme court may direct the lower court to enter judgment. Ehleiter, 121 Wis. 85, 105 Am. St. 1027; Harvey v. Richards. *Ad quæstionem facti*, etc. See APPELLATE PROCEDURE.

McALLISTER v. KUHN: L. C. 3.

McARTHUR v. HOWETT: L.C. 99.

McCARDLE v. McGINLEY (1882), 86 Ind. 538, 44 Am. Rep. 343, n., 4 Suth. Dam. 1235. § 296, Gr. & Rud.; Smith v. Burrus.

Malicious prosecutions are actionable, though there is no arrest or seizure of property. **McCardle v. McCormick Co.**, 63 Neb. 391, 93 Am. St. 449-474, ext. n.; **Weeks, Attys.**, Kolka, 6 N. Dak. 461, 66 Am. St. 615, n.: cases. English rule rejected; an action is now permitted. **Luby**, 111 Wis. 613, 87 Am. St. 897, n.; **McCormick, supra**. *Contra*, **Smith**, 175 Ill. 619, 67 Am. St. 242: cases; **Cin. Daily Co.**, 61 Ohio, 489, 76 Am. St. 430, n. One setting a harmful thing in motion is liable. **Scott v. Shepherd**. § 42, *Hughes' Proc.*

McCAUGHEY v. SCHUETTE: L.C. 184.

McCOMOGHEY v. JACKSON (1894), 101 Cal. 265, 40 Am. St. 53. Denials on information and belief. *Humphreys*: 38.

McCORMICK: See COMMERCIAL PAPER.

McCULLOCH (or Mc — or Mac — or McCullough) v. Maryland: L.C. 147.

McCULLY v. CLARK: L.C. 206.

McDERMOTT v. SEVERE (1906), 202 U. S. 600-612.

Negligence; evidence; if more than a scintilla the case will not be taken from the jury. **Bonnell**: 185: cases; 199 Mo. 561. *Children on R. R. track* require more caution than that due an adult. **Lynch v. Nurdin**.

General exception is not sufficient where a specific one is required in fairness to the court to give it an opportunity to correct the error. L.C. 290a, 299. See ASSIGNMENTS OF ERROR; § 53 (convenience), Gr. & Rud.; 199 Mo. 597, 716.

Ad damnum limits the recovery; beyond it the jury will not assess damages. § 600, Gr. & Rud. See AD DAMNUM.

McDONALD v. P. (1888), 126 Ill. 150, 9 Am. St. 547. Bill of particulars. *Cryps v. Baynton*.

McELMOYLE v. COHEN: L.C. 56.

McKRYING v. BULL: L.C. 33.

McLAUGHLIN v. KELLY: L.C. 31.

McLAUGHLIN v. S. (1873), 45 Ind. 338 (an indictment must be certain).

McLEAN v. JEPESON (1890), 123 N. Y. 142, 9 L. R. A. 493, n. Assessing powers are strictly judged. *Westfall*; *Blair*: 170; *Drew*; *Fletcher*; *Moser*; *Piper*: 114; *Bloom*: 266.

McLEOD v. BERTSCHY (1873), 36 Wis. 176, 14 Am. Rep. 755-759.

Practice; dismissed; discontinuance: Where the defendant in an action sets up a counterclaim in his answer, the court has no authority to grant plaintiff leave to discontinue the action, except as to his own claim or demand. *Blair*: 170. See CROSS BILL.

M'MANUS v. CRICKETT (1800), 1 East 106, 2 Thomp. Neg. 865-916, n., 60 Ohio St. 450, 46 L. R. A. 314, *Shear, Neg.* 66, 1 Add. Torts, 550, 2 Kent, 260, *Mews' E. C. L.* 73 Miss. 161, 31 L. R. A. 198, 44 Am. St. 522, *Mech. Ag. St.*, *Huffe*, *Reinh.*, *Tiff.*, *Whart.*; *Bish. Torts*, 614, n. (criticised), *Cool.*, 1 Add. Torts, 36 *Chit. Conts.*, *Pars.*; *Suth. Dam.* 468, 951, *Bro. Max.* 848, *Wood, Nuis.*, 2 Gr. Ev. 68, 621; 128 Ill. 613, 4 L. R. A. 481; 73 Miss. 161, 31 L. R. A. 198, 55 Am. St. 522; 68 N. J. L. 324, 96 Am. St. 546, *Busw. Pers. Inj.*, *Schoul. Bailm.*

Cited, §§ 306, 307, 309, 342, *Hughes' Proc.*; §§ 296, 298, 302, 303, Gr. & Rud.

LEADING AND COGNATE CASES: *Craker v. R. R.*; *Dixon v. Bell*; *Limpus v. General*

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Omnibus Co.; *Poulton v. R. R.*; *Morier v. R. R.*; *Hilliard v. Richardson* (*Respondent superior*; independent contractor, when liable); *Reedie v. London R. R.*; *Chicago v. Robbins* (*Robbins v. Chicago*); *Gregory v. Piper*; *Mellors v. Shaw*; *Quarman v. Burnett*; *Ellis v. Sheffield Gas Consumer Co.*; *Burgess v. Gray*; *Laning v. N. Y. Cent. R. R.*; *Croft v. Allison*; *Whatman v. Pearson*; *Story v. Ashton*; *Roberts v. Smith*; *Holmes v. Clark* (*Clark v. Holmes*); notes to *Armory*: 180.

M'Manus stated: Agency; torts; Respondent superior. C's coachman had a grudge against M., with whom he purposely collided while in charge of C's turnout. For this malicious act of B, the servant, M. sued the master. *Held*, he was not liable. *Qui per alium*.

Little Miami R. R. v. Wetmore (1869), 19 O. 110, 2 Am. Rep. 373, 32 Am. St. 100 (criticised), *Mech. Ag.*, *Cool. Torts*, *Bish.*, *Shear, Neg.*, *Busw. Pers. Inj.* (a baggage master got into an altercation with a passenger and wounded him with a hatchet—railroad was not liable); *Rahmel*; *Candeff v. R. R.* (conductor killed one stealing from a car); *Contrell v. Colwell* (1859), 3 Head (Tenn.), 471, 2 Thomp. Neg. 885, 887, *Busw. Pers. Inj.*, citing leading cases. See *Morier*; *Poulton v. R. R.*; *Croft*; *Craker*: cases; *Williams*, 115 Ala. 277, 41 L. R. A. 650, ext. n.; *McDermott*, 105 La. 124, 29 So. 498, 83 Am. St. 225; *Daniel v. R. R.*, 117 N. C. 592, 4 L. R. A. (N. S.) 485-515, ext. n.; *Stranahan*, 55 O. 398, 4 L. R. A. (N. S.) 506, n.; 70 L. R. A. 731-742, 943.

Servant or agent turning aside from master's employment does not make him liable. *Storey v. Ashton*; *Ritchie*, sub *Morier Case*; *North Chicago R. R.*, 128 Ill. 613, 4 L. R. A. 481; *Pierce v. R. R.*, 124 N. C. 83, 44 L. R. A. 316; *Galveston R. R.*, 93 Tex. 64, 44 L. R. A. 553; *Dickson*, 135 Ind. 507, 41 Am. St. 440, n., 24 L. R. A. 483; *Southern Bell Tel. Co.*, 109 Ala. 224, 31 L. R. A. 193 (discusses *Gregory v. Piper* and *M'Manus*); *Whart. Conts.* 479; *Hilliard*: cases; 103 Am. St. 374, n.; *Goodloe*, 107 Ala. 233, 54 Am. St. 67-93, ext. n.; *Western Ry.*, 135 Ala. 205, 93 Am. St. 31 (superintendent tickling servant); *Burnett v. Oechsner* (1899), 92 Tex. 588, 71 Am. St. 880 (servant asporting another's hogs to master's ranch and unloading them there makes him liable. See *R. v. Riley*).

Common carrier is liable for wilful injury to a passenger by a servant. *Craker*; *Dwinelle*, 120 N. Y. 117, 22 Am. R. R. & Corp. Rep. 492-500, n., 8 L. R. A. 294, 44 Am. R. R. & Corp. Rep. 492, *Busw. Pers. Inj.* 37, 47; *Kansas City*: 357. Sleeping-car porter is agent of carrier, as well as car company. *Dwinelle*; *Pullman*, 28 Neb. 239, 1 Am. R. R. & Corp. Rep. 194-226: cases, 26 Am. St. 325-340, ext. n., 6 L. R. A. 809 (liability for passenger's apparel); *Pullman*, 93 Tenn. 53, 21 L. R. A. 298, 42 Am. St. 902, n., 2 Am. R. R. & Corp. Rep. 429-436. A steamboat company is liable for theft of money. *Adams*, 151 N. Y. 163, 56 Am. St. 616, n. See 3 Suth. Dam. 956. Carrier's duty to protect passengers from assaults of employees. *Birmingham R. R.*, 130 Ala. 334, 89 Am. St. 43, n.

"Scope of agency"; principal liable for agent's acts within. *Gregory*; 1 Thomp. Neg.; *Wilson*, Am. L. C.; *Cornfoot*. Wantonly striking the plaintiff's horse and so causing an accident will not render the

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master responsible. Croft. Nor moving a locomotive to frighten people. Stephenson, 93 Cal. 558, 15 L. R. A. 475. See Euting, 116 Wis. 13, 96 Am. St. 936, n. (railroad liable for injury done by engineer with torpedoes). If a boy is sent to drive a horse out of a field, and he throws a stone and breaks its leg, the master is not liable. Cantwell, *supra*; Gregory.

A servant, in assaulting a boy to punish him for breaking his master's ax, is not acting within the scope of his employment, and the master is not liable for the assault. Brown, 178 Mass. 108, 86 Am. St. 469, n.; Holler, 68 N. J. L. 324, 96 Am. St. 546; cases; Powell, 3 Cush. 300, 50 Am. Dec. 738; Mech. Ag., Huffc.; Reinh.; Tiff.

Duty of a master with respect to the employment of the servants; what constitutes an incompetent servant. Smith, 151 Mo. 597, 48 L. R. A. 368-393, ext. n.; Farwell. Malicious arrests. Huffc. Ag. 161.

Master must know and keep informed as to the servant's fitness. S. P. R. R., 135 Fed. 272, 68 C. C. A. 26, 1 L. R. A. (N. S.) 288, n.; Farwell; Labatt, § 195.

Privity of the principal is the element upon which the liability of the principal depends. Labatt, Mas. and Ser. His interest, his assent and his privity are the essentials to found liability.

Craker (or Croaker) v. Chicago & N. W. R. R. (1875), 36 Wis. 537, 17 Am. Rep. 507-515; 60 O. St. 450, 46 L. R. A. 315, 66 L. R. A. 657; Suth. Dam.; 15 L. R. A. 476, 20 L. R. A. 176, 353, 354, Hutch. Carr., 8 Rul. Cas. 376, 460, Mech. Ag. 751, Bish. Torts, 1 Pars. Conts. 115, Thomp. Neg., q. v. § 309, Hughes' Proc.

Craker stated: Miss Craker, aged twenty, took passage from Reedsburg to Baraboo. The conductor, a young man, was alone with her and behaved with offensive familiarity. The company owned her protection—that is the burden of the decision. For these cares the company was compelled to pay \$1,000. *Respondent superior* was rigorously applied. "The wolves may not, but the dogs may, worry the sheep," is tersely and with great force expressed. The case cites and approves *M'Manus*.

Suth. Dam. 409, 2 Sedgk. Dam. 379; Davis, 33 Neb. 582, 14 L. R. A. 737 (assault by a servant); Busw. Pers. Inj. 37-50; Savannah Co., 103 Ga. 125, 68 Am. St. 86, 40 L. R. A. 483 (liable for servant's rape); 101 Am. St. 722-772, ext. n.

Common carriers must protect passengers. Cobb, 119 Wis. 597, 604 (carrier's contract); Baltimore Co., 30 Md. 23, 45 Am. St. 319, n., 26 L. R. A. 220; Knoxville Traction Co., 103 Tenn. 376, 46 L. R. A. 549; cases; Kansas City: 357; Beale, Dam. 16.

Exemplary damages; liability for. Hoboken Co., 59 N. J. L. 218, 59 Am. St. 585-600, ext. n.; Merest; *Milwaukee R. R. v. Arms* (1875), 91 U. S. 489, 23 L. ed. 374; Lexington R., 111 Ky. 799, 98 Am. St. 430 (exemplary damages for assault of conductor).

Keepers of inns and saloons must protect guests and patrons. Caye: 356; Smith, Lead. Cas. (Innkeepers' duties); Rommel, 120 Pa. 579, 6 Am. St. 732-737 (saloon-keepers have police power to protect employees, guests and customers). See U. S. v. Holmes.

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Employing one to guard and arrest for trespassing renders master liable for arrest legally made in form. Evansville R. R., 99 Ind. 519, 50 Am. Rep. 102; St. Louis, etc., 58 Ark. 381, 41 Am. St. 106, n. (liability for agent's torts); Central R. R., 78 Md. 394, 27 L. R. A. 63, n. (false imprisonment by superintendent); Mulligan, 129 N. Y. 506, 14 L. R. A. 791, ext. n.; Gillingham, 35 W. Va. 588, 14 L. R. A. 798, n.; Eichengreen, 96 Tenn. 229, 31 L. R. A. 702; Wheeler & Wilson, etc. Co., 36 Kan. 350; *M'Manus*; Columbus R. R., 128 La. 631, 119 Am. St. 404. See *Qui sentit commodum*.

Corporations liable for torts. Cool. Torts, 136-141, Bish. Torts, 718-737, 1 Wat. Tres. 184, 2 Kent, 284, Cook, Stockh. 398; Merchants' Bank.

Corporations liable for crimes. R. v. Birmingham R. R.; R. v. Great North R. R. And for torts, e. g., false imprisonment of a passenger by a conductor. Lynch, 90 N. Y. 77, 43 Am. Rep. 141; Palmer, 92 Me. 399, 44 L. R. A. 673.

Respondent superior. Hay; Hilliard; *M'Manus*.

There is an implied contract on the part of a common carrier that a passenger shall receive proper, polite and courteous treatment from its employees. Knoxville Traction Co., 103 Tenn. 376, 46 L. R. A. 549, n. A breach of this contract may constitute a tort.

Carrier's duty to protect passengers. Birmingham R. R., 130 Ala. 334, 89 Am. St. 43, n.; Craker.

Principal liable for agent's wilful and malicious acts done in the course of his employment. Nelson Business College, 60 Ohio, 448, 46 L. R. A. 314, ext. n.; Dixon v. Bell; Rahmel; 119 Am. St. 404.

Dixon v. Bell (1816), 5 Maule & S. 198, 17 R. R. 308, 1 Stark. 287; Suth. Dam., Mews' E. C. L.; Bigl. Lead. Cas. Torts, 568; 1 Add. 544, 584, 1288; Moak, 274; Cool., Bish. Torts, 1 Kinkead, 265, 17 L. R. A. 34; Shear. Neg., Whart., Huffc. Ag. 296 (personal injuries to servant); 36 Am. St. 814; Busw. Pers. Inj. 129, 46 L. R. A. 38; Suth. Dam., Thomp. Neg. q. v.

Dixon stated (principal liable for torts of the agent): Bell sent a young girl after a loaded gun with directions to take the priming out, which was accordingly done. However, she pointed the gun at the plaintiff's son and pulled the trigger, thus firing the gun. *Held*, Bell was liable. See *M'Manus*: cases; Craker: cases; Squib Case. *An infant may be an agent.* Dixon.

Infant liable for damages caused by the explosion of fire-works. Squib Case, stating *Morgan v. Cox*, where infant was liable for accidentally killing a slave. Infants are liable for their torts. Gilson v. Spear. See INFANTS.

Noxious elements, dangerous instruments and contagious diseases must be restrained at keeper's peril. Fletcher v. Rylands; Scott v. Shepherd; Missouri, K. & T. R. R. v. Wood (contagious disease).

Limpus v. General Omnibus Co. (1862), 1 Hurl. & Colt. 526, 17 Rul. Cas. 528, Moak, Torts, 33-36, 1 Add. 500, Bigl. Lead. Cas. Torts, 35, Whart. Ag., Bish., Bro. Max. 846, Whart. Neg., Shear., Thomp., q. v., Lind. Part. 148, 150; Mews' E. C. L. See R. v. Almon; P. v. Robey.

Limpus stated: Respondent superior. An omnibus company has these regulations: "During the journey the driver must drive

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his horses at a steady pace, endeavoring as nearly as possible to work in conformity to the time list. He must not on any account race with or obstruct another omnibus, or hinder or annoy the driver or conductor thereof in his bus, whether such omnibus be one belonging to the company or otherwise."

A driver departed from these instructions and upset a rival bus of plaintiff. The driver acted recklessly and in disobedience of instructions. But it was held that he acted within the scope of his employment and that the principal was liable, as in *Gregory*.

See *M'Manus*: cases; Poulton; Moak, Torts, 35; *Qui sentit commodum, sentire debet et onus*.

A collecting agent caused an illegal arrest, for which the company was liable. *Wheeler*, 36 Kan. 350, 13 Pac. 609. Cattle escaped from cars and the station agent offered a reward. R's son took his father's mare to overtake the cattle, and one of them gored the mare. *Held*, R. could recover from the company. *Atchison R. R.*, 40 Kan. 421; *In fictione juris*, etc. See *Hilliard*; *Miami R. R.*; *AGENCY*, sub *M'Manus*.

Poulton v. London R. R. (1867), L. R. 2 Q. B. 534, 8 B. & S. 616, 19 L. R. A. 825, 826, 1 Wat. Tres., Shear. Neg., Mews' E. C. L., Moak, Torts 36, Cool., Bish., Add., Wh. Ag., 1 Pars. Conts. 115, Bro. Max. 821, 825. § 309, Hughes' Proc.

Officious arrest by a conductor of a passenger train is not the tort of the railroad. *Bish.* Torts, 614, 2 Add. 817, 833. *Mall*, 39 N. Y. 381, 100 Am. Dec. 448, 1 Wat. Tres. 43, Cool. Torts, 629, Shear. Neg. 61, Thomp. Neg. q. v.; *Staples*, 18 R. I. 224, 19 L. R. A. 824; *Palmer*, 133 N. Y. 261, 16 L. R. A. 136, n.; *Elchengreen*, 96 Tenn. 229, 54 Am. St. 833, n. (arrest by a railroad detective makes the railroad liable); 2 Add. Torts, 817, 833; *Gulf*, etc. R. R., 80 Tex. 362, 26 Am. St. 749; *Huffc.* Ag. 161.

Agent can do only lawful acts. *Poulton*. Implied power is not inferred or assumed to do illegal or criminal acts. *Id.*; *Little Miami R. R.*; *M'Manus*; *Morier*.

Morier v. St. Paul R. R. (1884), 31 Minn. 551, 47 Am. Rep. 793, *Pattée*, Cas. Torts, 289, *Bish.* Torts, Cool., Mech. Ag. 632, *Reinh.*, Tiff., *Huffc.*, *Labatt*, Mas. & Serv.

Morier stated: Section hands on a railroad, making a fire to warm their dinners, and allowing it to escape into a field and burn hay, are alone liable for it. See *M'Manus*; *Hilliard*; *Gregory*; *Limpus*; *Miami*.

Deviation by servant from course of employment. *Ritchie*, 63 Conn. 155, 38 Am. St. 361-370, n., 27 L. R. A. 161-203, ext. n.; *Poster*, 115 Tenn. 688, 112 Am. St. (inviting child to ride in danger).

Servant in the employment of another; who liable for acts of. *Sacker*, 98 Md. 93, 103 Am. St. 374, n.

Damages caused from servant obeying orders render master liable. *Gregory*: cases.

Fireman placing torpedo on track and engineer driving the locomotive over it and by it injuring a bystander, makes the railroad liable. *Euting v. R. R.*, *supra*.

Hilliard v. Richardson (1855), 3 Gray, 349, 63 Am. Dec. 743, *Bigl.* L. C. Torts, 363, *Redf.* L. C. Am. Rys. 356, 2 Thomp. Neg. 868-916, n.; 37 L. R. A. 81, 107 Mass.

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577, 40 L. R. A. 345, 2 Chit. Conts. 864, *Bigl.* L. C. Torts, 654, 60 Vt. 431, 6 Am. St. 128, 2 Gr. Ev. 232, n., Mech. Ag., Sto., Whart., Whart. Neg., Shear. Neg., 2 Dill. Corp., 76 Am. St. 386.

Cited, § 303, Gr. & Rud.

Hilliard stated: *Respondent superior*. R. agreed with a contractor, Shaw, that he should make some alterations in one of R.'s buildings. In performance of S.'s undertaking, one of his workmen allowed some of the material for use in the job to remain in the street over night, where they were an object of fright. *Hilliard* was driving past, when his horse took fright, resulting in personal injuries to H. He sued R. for damages. *Held*, there could be no recovery; that S. being an independent contractor, he, and not R., had control of the workmen, and if any one was liable it was S.

Richmond v. Sitterding (1903), 101 Va. 354, 65 L. R. A. 445-508 (independent contractor); *Sallotte v. King Bridge Co.* (1903), 58 C. C. A. 466, 122 Fed. 378, 65 L. R. A. 620-655 (torts of independent contractor); *Thomas v. Harrington* (1903), 72 N. H. 45, 65 L. R. A. 742-757; *Jacobs v. Fuller Co.* (1902), 67 Ohio, 70, 65 L. R. A. 833-856, ext. n. (dangerous work); *Chicago v. Murdock*, 212 Ill. 9, 103 Am. St. 221, n.

Berg, 156 N. Y. 109, 66 Am. St. 542, n., 4 L. R. A. 391 (contractor blasting rocks is independent). See *Hay*; *Powell*, 88 Tenn. 692, 17 Am. St. 925, n. (who is independent contractor); *Hawver*, 49 Ohio St. 69, 14 L. R. A. 828-836, ext. n. (exceptions to *Hilliard*); *Thompson*, 170 Mass. 587, 40 L. R. A. 345; *Smith*, 87 Md. 610, 42 L. R. A. 277 (a balloonist employed to make an ascension is independent); *Bonaparte*, 89 Md. 12, 44 L. R. A. 482, n. (excavating lot). The test is: "You must look to the wrong-doer himself, or to the first person in the ascending line who is the employer and has control of the work. You cannot go further back and make the employer of that person liable."

Murray v. Currie, L. R. 6 C. P. 24.

Interference or supervision or direction will connect the employer with the tort. Where the employer personally interferes he is liable. *Burgess*; *Hay*.

Contract to do a thing unlawful also renders the employer liable. *Ellis v. Sheffield Gas*; *Hay*.

Reedie v. London, etc. R. R. (1849), 4 Exch. 244, 6 Eng. Ry. Cas. 184, Pars. Conts., Chit., Bro. Max., 1 Add. Torts, 580, 2 Kent, Com. 260, Sto. Ag., Whart., Huffc., Shear. Neg., Whart., 2 Dill. Munic. Corp. 1028-1030 (a railroad may retain the power to dismiss incompetent workmen and to superintend the grading for its track, and still not be liable for a death).

Chicago v. Robbins (*Robbins v. Chicago*) (1862), 2 Black, 418 (1867), 4 Wall. 657, 2 Am. Law Reg. (N. S.) 529, 161 U. S. 327, Wood, Nuis. 281, Shear. Neg., Whart., Thomp., Van Fleet, For. Adj., Cool. Torts, Bish. Torts, Dill. Corp., Beach, Corp., 1 Pars. Conts. 35, 76 Am. St. 401.

Rendering a street defective, for which a city is held liable, renders the actor liable over to the city for the damages it sustains. *Chicago*; *Washington Gas*, 161 U. S. 316; Wood, Nuis. 281; *Burgess*, 2 Beach, Pub. Corp. 1212, 1501. And if he knows the cause is in court, further notice to him is unnecessary. *Chicago v.*

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Robbins; Van Fleet, For. Adj. 576; Lovejoy, *sub* ELECTION.

Agency; independent contractor. Liability of employer for acts of independent contractor. Hilliard; Quarman; Burgess; Reedle; Chicago; Poulton; Gregory; M'Manus; Wilson; Farwell; Morier; Huffc. Ag. See *Qui per alium facit*, etc.; Ellis v. Gas Co., 2 Ror. R. R., pp. 820-842; Moak, Torts, 30-65; James, 93 Ky. 471, 40 Am. St. 200, n. (where act was *per se* a nuisance); 76 Am. St. 399; Hardy, 47 U. S. App. 362, 37 L. R. A. 33-85, ext. n. See cases, 85 L. R. A., *supra*.

Dangerous excavations adjoining highways. Fisher v. Thirkell; 1 Add. Torts, 232, 2 Dill. Corp. 701, 1030-1033; Coupland v. Hardingham (1813), 3 Camp. (Eng.), 398, 1 Thomp. Neg. 327-363, ext. n.; Wood, Nuis. 270, 146 Mass. 148, 4 Am. St. 280, Shear. Neg., Thomp. Whart.; 83 Va. 357, 5 Am. St. 285; Indemauro; Clark v. Richmond, 83 Va. 355, 5 Am. St. 281, n.; Abilene, 52 Kan. 824, 35 Pac. 317, 9 Am. R. R. & Corp. Rep. 685-697, ext. n.

As to liability for dangerous condition of premises lying open beside a highway or frequented path. Fisher v. Thirkell; Arnold, 152 Mo. 173, 48 L. R. A. 291, n.

Robbins v. Chicago. 2 Black, 418, 4 Wall. 657, Whart. Neg., Shear. Neg., Bish. Torts, 1 Wash. R. P. 590, 591, Dill. Corp., Beach, Pub. Corp., 2 Kent, Com. 274, 2 Van Fleet, For. Adj., Busw. Pers. Inj. Where the principal thing is legal, but is attended with dangerous incidents, in the natural course of things the employer is responsible. Robbins let to Button the contract to build a store-house on his lot, which work required an excavation to be made in the street, which if unguarded was likely to injure passengers. B.'s management not only invited but caused such a consequence. *Held*, R. was liable. St. Louis Ry., 53 Ark. 503; cases; 3 Am. R. R. & Corp. Rep. 406-409, Mech. Ag. 647; Cool. Torts, 646; Bower, 16 Moak, Eng. Rep. 374; Omaha, 35 Neb. 68, 37 Am. St. 432, n. (when job is intrinsically dangerous).

Statutory requirement that a thing be done efficiently entails liability upon the employer. Parliament authorized a company to make an opening bridge over a navigable river. They employed a contractor who failed from defective devices. The plaintiff's vessel was in consequence prevented from navigating the river. *Held*, the employer was responsible to him. Hole, 6 Hurl. & N. 488; City R. R., 80 Md. 348, 45 Am. St. 345. And this rationale attaches to a municipal corporation. Hill v. Boston: cases.

Independent contractor. Wallace, 91 Tex. 18; Boomer, 176 Mass. 482, 53 L. R. A. 172, n.; cases; Pittsfield Co., 71 N. H. 522, 60 L. R. A. 116, n.; McCarrier, 15 S. Dak. 366, 91 Am. St. 695 n. (strict rule of liability).

Gregory v. Piper (1829), 9 Barn. & Cress. 591 (4 Man. & Gr., 17 E. C. L. R.). 2 Thomp. Neg. 862-916, ext. n., 1 Wat. Tres. 8, 42, 49, 2 Chit. Conts., 866, 31 L. R. A. 196, 1 Add. Torts, 284, 422, Whart. Ag., Pars. Conts., Bish. Torts, Thomp. Neg., q. v., 2 Gr. Ev. 621; Mews' E. C. L.

Gregory stated: *Respondent superior*; agent's torts; agency. Piper ordered his servant Stubbings to pile up rubbish near

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the plaintiff's stable yard to obstruct a way in dispute between P. and G. P. instructed the servant to pile the rubbish carefully, and so that it would not touch G.'s wall. However, the rubbish fell over against the wall, for which G. sued P., who defended upon the idea that the limitations he placed upon the instructions given the servant was a defense. But he lost, for it was held that a master is liable in trespass for any act done by his servant in the course of executing his orders with ordinary care.

Gregory; Limpus. And agreeable to this case is *Wilson v. Peverley* (1823), 2 N. H. 548, 1 Am. Lead. Cas. 778, ext. n., Shear. 59, Mech. Ag., Sto., Cool. Torts, Bish., Whart. Neg., Chit. Conts., 1 Beach, Pub. Corp. 210 (servant setting out fire under master's order renders him liable where it escapes and does damage); 1 Suth. Dam. 408. See *Morier v. Railroad*; M'Manus; Poulton; *Powell v. Deveney* (1849), 3 Cush. 300, 50 Am. Dec. 738; Wheeler, 36 Kan. 350 (arrest of a debtor by an agent); *Atchison R. R. v. Randall*, 40 Kan. 421 (extreme case of liability sustained).

Mellors v. Shaw (1861), 1 Best & S. 437 (101 E. C. L. R.), Rule 15, Moak, Underh. Torts, Whart. Neg., Shear., Thomp., Mews' E. C. L., Cool. Torts, Add., Bro. Max. 853, 2 Chit. Conts. 858, 2 Kent, 260, Busw. Pers. Inj. 193; *Roberts v. Smith*; *Indemauro*.

Mellors stated: Mellors, a miner, sued his employers, the proprietors of a mine. The sides of a shaft had been left in an unsafe condition, and in consequence some of the "bind" fell on the miner's head, who was ignorant of the danger under which he was working, but one of the defendants—the superintendent of the mine—knew it. *Held*, the servant could recover.

Agency: Respondent superior. Master employing incompetent workmen, or using defective machinery, may be responsible to servant hurt thereby, in course of service. Farwell; Limpus.

Quarman v. Burnett (1840), 6 M. & W. 499, 10 Rul. Cas. 154, 156 N. Y. 109, 41 L. R. A. 394, 33 L. R. A. 46, 37 L. R. A. 72-77, Whart. Neg., Shear., Thomp., Bish. Torts, Cool. Torts, 1 Add. Torts, 112, 113, Pars. Conts., Chit., Mews' E. C. L., 2 Kent, 261, Bro. Max. 844, 850, 853, 864, Mech. Ag., Sto., Whart., Huffc., Bigl. L. C. Torts, 2 Gr. Ev. 232a. Hilliard; Berg, 156 N. Y. 109, 41 L. R. A. 391, n.

Quarman stated: Mesdames Burnett kept their own carriage, but hired a coachman and horses of one Mortlock. They paid the coachman 2s. a week, but he received regular wages from Mortlock. This coachman had a regular Burnett livery, worn when driving the horses, and at other times hanging in their hall. He was driving the mesdames as usual, and after this left his horses standing in the street and went into Burnett's hall to leave his livery. He did not hitch his horses and they ran away and injured Quarman, who sued the Burnetts upon the ground of *Respondent superior*. *Held*, they were not liable.

Persons employing a contractor not generally responsible. Hilliard.

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Horse left untied in the street is negligence. Quarman. See LAW OF THE ROAD.

Agency. Liability of employer for acts of independent contractor. Person employing a contractor generally is not responsible for his negligence. Hilliard; Burgess (obstructing street); Chicago v. Robbins; Breedie; Cabot, 166 Mass. 493, 33 L. R. A. 45; cases (exceptions); 37 L. R. A. 37-85, ext. n.

Ellis v. Sheffield Gas Consumer Co. (1853), 2 Bl. & Bl. 767 (75 E. C. L. R.); 87 Md. 610, 42 L. R. A. 281, Whart. Neg., Shear, Thomp., 1 Add. Torts, 285; Mews, E. C. L.; 115 N. Y. 213, 12 Am. St. 798, Sto. Ag. Huffc., Bish. Torts, Pars. Conts., Chit. Conts., Bigl. L. C. Torts, Wood. Nuis. 77, Bro. Max. 848, 2 Kent, 260, 76 Am. St. 385, 403.

Ellis stated: A company authorized to interfere with the streets of Sheffield directed their contractor to open trenches therein. The contractor's servants, in doing so, left a heap of stones, over which the plaintiff fell and was injured. Here the defendant company was liable, as the interference with the streets was in itself an *injuria* or wrongful act.

Negligence; agency. Principal is liable for damages caused by independent contractor, when the contract is to do an unlawful act; e. g., where the corporation has not the power to do the act contracted for. Hilliard.

Burgess v. Gray (1845), 1 C. B. (M. G. & S.) 578 (50 E. C. L. R.), 68 R. R. 769; Moak, Torts, 41, 1 Add. 224, 2 Kent, 260, 2 Gr. Ev. 232a, Sto. Ag. 454c, Whart. 483, 1 Pars. Conts. 113, 114, Bro. Max. 850, 852, Shear, 82, 263, 2 Chit. Conts. 863, 864; Mews' E. C. L.; Chicago v. Robbins; 1 Add. Torts, 234.

Burgess stated: Occupier or owner of premises suffering a contractor to obstruct the highway is liable for the consequences.

Respondent superior; agency; independent contractor. One is not liable for the acts of independent contractor unless the harmful act was done under the principal's supervision or immediate command. Hilliard; Chicago v. Robbins; Quarman. See AGENCY; JOINT TRESPASSERS; Covington Bridge, 61 Ohio, 215; 76 Am. St. 375-428, ext. n.; cases.

Laning v. New York Central R. R. Co. (1872), 49 N. Y. 521, 10 Am. Rep. 417, 2 Thomp. Neg. 932-1056, ext. n.; Moak, Torts, Busw. Pers. Inj., 2 Gr. Ev. 232a, Mech. Ag. 656-670, Huffc., Reinh., Tiff., 91 Tex. 289, Cool. Torts, Bish. Torts, Shear, Neg., Whart., Thomp.; Roberts v. Smith; Fisk, 72 Cal. 38, 1 Am. St. 22 (who are fellow servants).

Laning stated: L. was a carpenter and was injured by a falling scaffold, badly built of defective material by young and inexperienced men, C. and F., under the orders of Westman, a foreman, sober when employed, but drunk when he superintended the construction of the scaffold. L. was on the scaffold under the orders of Westman; he did not know who built the scaffold, nor of its defects. There was much evidence to show that he knew Westman, the foreman, and that he had knowledge of the surrounding danger and assumed the risks. However, the jury found for him, and the reviewing court sustained the finding.

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Agency; master and servant; negligent fellow-servants. Liability of master for injury to servant by unfit or incompetent fellow-servant. Waiver of master's negligence by servant. Salus populi suprema lex; Farwell; Priestly; Roberts.

Agency; torts of agents; Respondent superior; liability of principal for malicious acts of agent. Croft v. Allison (1821), 4 B. & A. 590 (6 E. C. L. R.), 23 R. R. 407, 2 Kent, 260, Shear, 67, 1 Add. Torts, 551, 586, 588, Mews' E. C. L., Bro. Max. 848, 853, Whart. Neg., 2 Chit. Conts. 865-868, Thomp. Neg., q. v., Busw. Pers. Inj., as "Craft v. Abison." S. P., M'Manus; Craker.

Acts outside of employment. Croft; Sullivan v. R. R., 115 Ky. 447, 103 Am. St. 330.

Whatman v. Pearson (1878), L. R. 3 C. P. 422; Whart. Neg. 166; 1 Add. Torts, 37, 2 id. 1076, Wh. Ag. 481, 535, 1 Pars. Conts. 116, Bro. Max. 100, 848, Whart. Neg. 166-177, Shear, 68, Thomp. q. v.; Bigl. L. C. Torts, 35; Busw. Pers. Inj. 37; Mews' E. C. L.

Agency; Respondent superior. Responsibility of a master for the wilful acts of the servant. M'Manus; Gregory; Little Miami R. R.; Limpus; Poulton.

Agency; Respondent superior. Acts not in line of employment, principal not liable for. Storey v. Ashton (1869), L. R. 4 Q. B. 476, 10 Best & S. 337; Shear, Neg. 63, Whart. 170, Mews' E. C. L., 1 Add. Torts, 550, Thomp. q. v., 2 Kent, 260; M'Manus; Morier; Poulton.

*Master must not order servant into danger. A laborer injured by a defective scaffold afforded for use by the employer may recover against him. Roberts v. Smith (1857), 2 H. & N. 213, 4 id. 15, 5 Am. Law Reg. (O. S.) 750, Bigl. L. C. Torts, 684, Shear, Neg., Bish. Torts, Wood, Mast. & Serv., Mews' E. C. L., Cool. Torts, Whart. Neg., Chit. Conts., 2 Kent, 260, Busw. Pers. Inj., Labatt, Mast. & Serv.; Houston Ry., 96 Tex. 121, 97 Am. St. 877-900, ext. n. (duty to obey—assumption of risk); Heaven; Beesley, 103 Mich. 196, 27 L. R. A. 266; cases (scaffolds); Walkowski, 115 Mich. 629, 41 L. R. A. 33-153, ext. n.; James, 50 La. Ann. 717, 44 L. R. A. 33-90, ext. n. (servant entitled to notice of perils). *Dangerous premises; notice due to servant. Barter v. Roberts (1872), 44 Cal. 187, 13 Am. Rep. 160-164, n., 13 Am. Law Reg. (N. S.) 4-50, n.; cited, 2 Gr. Ev. 232b, Whart. Neg. 211, n., 44 L. R. A. 37, 38, 2 Thomp. 993; Michael, 90 Va. 492, 44 Am. St. 927 (duty to warn), 44 L. R. A. 33-90, ext. n.; Heaven v. Pender; 46 L. R. A. 33-122, ext. n.; Monmouth Min. Co., 148 Ill. 521, 39 Am. St. 187; Southern Pac. R. R., 152 U. S. 145; cases, Bro. Max. 853; Dill, 164 Ind. 507, 69 L. R. A. 163-174 (obeying direct command of master). See Burke v. Davis. § 348, Hughes' Proc.**

Dangerous premises. Indemaur; Heaven; Holmes v. Clarke; Yarmouth; Patton, 179 U. S. 658 (burden of proof).

Holmes v. Clarke (Clarke v. Holmes) (1861), 6 Hurl. & Nor. 349, 7 Hurl. & Nor. 937, 2 Thomp. Neg. 953, 2 Am. L. Reg. (N. S.) 107, Mews' E. C. L.; Mech. Ag., Cool. Torts, Bro. Max. 268, 1 Add. Torts, 256, 564, Shear, Whart. Neg. 211, 214, 220, 243, Thomp. q. v., Chit. Conts. 858, Bigl. L. C. Torts, 708, 2 Add. Conts. 888, 2 Gr. Ev. 232a; 91 Tex. 287; Priestly; stated and distinguished; also Mel-lors; Roberts; Morris Co., 200 Ill. 132, 93

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Am. St. 180, n.; Thompson, 71 N. H. 174, 93 Am. St. 504. *Dangerous premises; owner's liability for.* Indemaur.

Holmes stated: Plaintiff was an employee about dangerous machinery, which a statute required should be fenced for protection. This fence had fallen into decay and was removed, and the plaintiff complained to his employer of the danger, who gave assurances that the protection should be restored; but this he failed to do, and the employee was injured. *Held*, he could recover.

Negligence; agency; master and servant; statutory obligation of master. Contributory negligence of servant by continuing in the service with knowledge of the defects. Roberts v. Smith; Clarke v. Holmes; Laning; Volenti.

Clarke v. Holmes (see Holmes v. Clarke), Shear. Neg. 96; Whart. 77, 216; Busw. Pers. Inj. 230, 231; Roberts v. Smith; Mellors. *Employer's act.* Busw. Pers. Inj. 227-234.

Risks assumed by employee; contributory negligence in entering and remaining in an employment; Volenti; Limberg. 127 Cal. 598, 49 L. R. A. 33-62, ext. n., 87 Am. St. 547-595, cited post, *MINE OWNERS.* Cleveland R. R., 191 U. S. 334; Upthegrove, 118 Wis. 673 (applies to minors); Pantz, 118 Wis. 47; Burke v. Davis, 191 Mass. 20, 4 L. R. A. (N. S.) 971; Priestly.

Assumption of risk. Buckner, 124 Ia. 445, 104 Am. St. 354; Stevens, 73 N. H. 119, 70 L. R. A. 114: cases (independent contractor); Shaver, 36 Ind. Ap. 233, 114 Am. St. 373.

Injuries to servants for want of blocking at switches. Narramore, 96 Fed. 298, 37 C. A. 499, 44 L. R. A. 68 ext. n.; Brazil Co., 160 Ind. 319, 98 Am. St. 288-335, ext. n. (defective machinery).

Servant's right of action for injuries received in obeying a direct command. Dallemand, 175 Ill. 310, 48 L. R. A. 753-760, ext. n.; Roberts v. Smith; Laning; Farwell (fellow-servants).

Liabilities for injuries received by the servant in the performance of duties outside the scope of his original contract. Olson, 76 Minn. 149, 48 L. R. A. 796-809, ext. n.

The right of a servant to recover damages from persons other than his master for injuries received in the performance of his duties. Cleveland R. R., 152 Ind. 607, 46 L. R. A. 33-122, ext. n. (reviewing Heaven).

Statutory liability of employer for the negligence of employees exercising superintendence. Canney, 51 C. C. A. 53, 113 Fed. 66, 58 L. R. A. 33-61, ext. n.; Labatt.

Master and servant; safe place to work. A servant assumes the risk of his employment. Hurst, 163 Mo. 309, 85 Am. St. 539-546, ext. n.; Labatt; 4 L. R. A. (N. S.), 220.

Volunteers; acts of; master not liable for. McGill, 70 N. H. 125, 85 Am. St. 618-627, ext. n., sub *M'Manus*.

Duty of mine owner to prevent injury to their employees. Wellston Coal Co., 65 Ohio St. 547-595, ext. n.; Mellors.

Defective plant and premises. Coley, 128 N. C. 534, 129 N. C. 407, 57 L. R. A. 817, ext. n.

Effect of an assurance of safety given by the master or a co-servant. McKee, 167 Mass. 69, 48 L. R. A. 542-547, ext. n.; Burke v. Davis, *supra*; Morden, 228 Ill. 246, 119 Am. St. 428-442, ext. n.

M'NAGHTEN'S CASE: L. C. 195.

MECHANIC'S LIEN: 27 Cyc. 1-464. Upon building distinct from land. Zabriskie, 67 Neb. 581, 82 L. R. A. 369-383: cases. See And. Dic.

MELIOR EST CONDITIO DEFENDENTIS (or possidentis): The cause of the defendant is the better. Dig. 50, 17, 126, 2 Hob. 199; *In pari delicto*, etc.; *In æquali melior*, etc.; Bro. Max. 714-719, 8th ed.; *Actore* (burden of proof). §§ 155, 157, Hughes' Proc.

Every presumption is against a plaintiff, who must allege and prove his case. *Favorabiliores*, etc.; *Melior est conditio possidentis et rei quam actoris*: Better is the condition of the possessor and that of the defendant than that of the plaintiff. Coke, 4th Inst. 180, Hob. 103; *In pari delicto*, etc.; Holman: 363.

Melior est conditio possidentis, ubi neuter jus habet: Better is the condition of the possessor where neither of the two has a right. Jenk. Cent. 118; *In æquali melior*; *Pacta*; Union Co., 150 Calif. 159, 119 Am. St. 164-181, ext. n.

MELIUS (EST) PETERE FONTES quam sectari rivulos: It is better to seek the fountains than to wander down the rivulets. See *Satus*, etc.; Warren v. Lusk, 18 Mo. 109.

LEADING CASES: *Virginia Coupon Cases* (The constitution of the United States is the supreme law; it over-towers and regulates state constitutions and inferior laws). *In præsentia majoris cessat potentia minoris.* See *Marbury*; Milligan's Case.

Kelly v. Bemis: 142 (An unconstitutional law is of no effect).

Tyler v. Pomeroy (Governmental agencies like towns and countries can exercise no right or power not issuing from a higher source).

Mostyn v. Fabrigas: 1 Smith's Leading Cases (A governor can exercise no right or power not given by the law).

Church of Holy Trinity v. U. S.; *Trist v. Child* (Construction is for the preservation and perpetuity of government. The power of courts to construe the law exists by constitutional implication).

Observations on writing and teaching

the law; the value of maxims. The proverbs of Solomon have been commended by teachers and philosophers throughout the ages. The careful and persistent seeker after truth will readily recognize the wisdom in his advice to observe the actions of a certain little faithful and tireless creature, when he said: "Go to the ant, thou sluggard, consider her ways and be wise." Possibly it was such instructive and helpful guides that enabled the Greek to learn the dominant initial from which the Parthenon was drafted, the secret of which was buried with him. Who knows the source from which the pyramid builders learned their knowledge of mechanical powers? The ant, the bee and the spider have taught the architects and mechanics many useful lessons. These observations are made to suggest the fact that from little and commonplace things much may be learned. The

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thought now under consideration leads the attention to the great part that the element called "nature" takes in learning, arts and sciences. Many great lawyers and statesmen have come forth from humble origins. When questioned as to the source of their wisdom and understanding they have usually answered that they learned most from small things and that well directed beginnings were the most important events in the history of their careers.

All law-givers and teachers who have sought rightly to lead and instruct have naturally found that their utterances were much privileged. Both they and the public were interested in the instruction and this fact necessarily gave them license to teach and to advise the adoption of rules of conduct. Particularly was this true in ancient times. *Salus populi suprema lex* was well understood and likewise respected by antiquity. This maxim is a fountain upon which have arisen many discussions, as will be indicated later when the same shall be taken up and treated. It is well here to admonish the student that as a fountain this maxim must be clearly perceived and thoroughly comprehended. The influence of this maxim is far-reaching and none is better designed to kindle a spirit of altruism than this one. There is no limit to the exercise of the imagination in the study of this maxim.

Hamilton in the *Federalist* commended the study and use of maxims and directed the student to learn them. He mentioned them as the fountains for sound instruction and pointed out the advantages of knowing them.

Maxims were well known to the Romans. They were constantly quoted and cited by them as authority. They were there regarded as the fundamentals of the law and the acceptance and citation of them were finally made compulsory. In 527 A. D. Justinian viewed the greatest event of antiquity—a most momentous event in the world's history—the decline of the Roman empire—and saw the greatest evil afflicting his realm was the uncertainty in the interpretation and application of the laws, which evil was due to the enormous volume of the laws in a state of confusion, contradiction, repetition and disorder, together with the

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numerous conflicting commentaries thereon. The condition was a deft to the necessity of a great and lasting empire. He conceived a plan to remodel the laws concisely and to simplify the task of learning the same by improving their expression and arrangement. By the labors of the wise commission by him appointed the laws were narrowed and condensed to the fundamental principles thereof, the greater part of which consisted of maxims or proverbs.

Justinian and Bacon endeavored to rescue and protect the law from adulterating influences. One thousand years after Justinian Bacon came forth to survey and comprehend the entire field of the world's acquired knowledge. He closely viewed the great events of a century including the greatest one in this world's history—the discovery and exploration of America—and he too, like Justinian, saw the utility and necessity of condensing the English laws into basic principles. Bacon's plan was to extract and compile from the Roman law and decided cases certain rules and maxims consistent with nature, reason and morals, and to adopt these as the proverbs or fundamentals of the law. These maxims were to embody the condensed good sense of nations and were to be the basic elements or fountains from which the law should be written and taught. Before him lay three centuries of year-books the last of which appeared in A. D. 1536, but a short time before his birth. These year-books were crudely built from and upon the maxims which were the very heart and vitals of the Roman law. These maxims were early incorporated into the English laws while the Romans exercised a dominant influence over Britain from 54 B. C. until the last emperor of the Cæsars of the Roman Empire was finally overthrown by the barbarians in A. D. 476. Of course the Roman dominion over England was attended by the Roman law. It is also a fact that prior to and during the time the Magna Charta was granted in A. D. 1215, the Roman law was written on and taught by the jurist Azo whose works were almost copied by Bracton who also began to write soon after that time. Rome still holds dominion over this world by virtue of the laws she made and gave!

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Justinian strove to protect the fundamentals of the law when he promulgated an edict commanding that all commentators who failed to cite and refer to them should be criminally punished and their writings burned. Empirics were not then allowed to adulterate and unsettle the laws. Quackery has always befogged jurisprudence as much as medicine or theology.

The Renaissance—the most important period in the world's history (1492 to 1648)—brought with it the greatest philosopher, statesman and jurist—Francis Bacon. He saw that the laws of England were being borne down by the overtopping masses of year-books and the conflicting and warring publications which the recent invention of printing had produced. Many of these he knew were plagiarized and others dangerously misleading and bewildering. He too saw the necessity for governmental interference in the writing and teaching of the law; he interceded with King James I. for aid and authority to publish a manuscript prepared by him which was to give to the world a law book on a plan founded upon and connected with the maxims which he regarded as the fundamentals of the law.

Bacon's efforts in support of his plans. Bacon saw that the English laws were becoming voluminous and tending to confusion and he predicted that unless the laws were condensed and concisely remodelled great disorder would some day result. He had studied the history of the Roman law and knew that that law was the basis of the English system of laws. He believed, as other jurists and philosophers had thought, that out of the mass of a country's laws there could be extracted enough good substance upon which to reconstruct a complete and well-written systematic body of laws. He considered the maxims to be the vital germs and enduring principles of the law. In other words he commended and treated the maxims as the fountains of the law. In this connection it is very important to know what the fountains are in order to make an intelligent application of *Melius petere fontes quam sectari rivulos*. To mistake the rivulets for the fountains would lead to palpable harm and lasting mis-

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chief. That there are grounds and rudiments of the law no one should doubt. They are comparatively few but underlie and permeate the whole legal system. They can be gathered, tabulated and made prominent and impressive; and when thoroughly learned and understood, they can be used in every branch of the law. The truth of these statements is fully demonstrated by Bacon's treatment of *In jure non remota causa sed proxima spectatur* and other maxims, and by Broom's treatment of *Salus populi suprema lex* and others.

The works of Bacon and Broom are filled throughout their pages with great rules and principles. These are facts the student must test for himself in the present age for he is not protected in this regard by the law itself. A maxim made prominent by both Bacon and Broom according to the method already referred to is *Verba fortius accipiuntur contra proferentem* (the words of an instrument are to be taken most strongly against the person offering it or in other words every presumption is against the composer or pleader or claimant). This maxim may well be referred to in this connection for it tends to illustrate the principal maxim of this discourse. *Verba fortius*, etc., is one of the most instructive maxims of the law and has a profound significance in many relations. This maxim might be referred to appropriately as the "venerable rule," for the reversal of its application would result in the change of the nature and structure of government. The principle expressed in it can not be reversed or disregarded in a government of defined and limited powers, for to reverse or disregard it would make the procedure inquisitorial or savage in character; thus to indict would be to convict, for who could defend himself if he were presumed guilty from the indictment? This would shift the burden of proof; property could be confiscated in reality, for all a claimant would be required to do would be to allege he was a creditor or the owner. This is a maxim of the greatest importance to the practitioner and also to the constructionist. It applies alike to all relations and subject-matter and is a fountain of reason and an instrument of protec-

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tion. This maxim has many cognates and is a fountain from which issue many rivulets, such as the cases, *Dovaston v. Payne*, *Rushton v. Aspinall*, *U. S. v. Cruikshank*, *McCore v. C.*, and others.¹ A full comprehension of *Verba fortius*, etc., should be gained by the student; he can then perceive the truth of *Melius petere*, etc., the chief maxim of this discourse.

Empiricism mystifies and befogs the law. No lawyer or author who rightly understands the principle of *Verba fortius*, etc., and its cognate maxims,² will ever argue or teach that the pleadings or any part of the mandatory record can be waived. Reason and logic teach that there can be no certainty and stability in a procedure—no real constitutionalism in a government—where a complete, entire and distinct mandatory record is not kept and preserved. Proceedings without that record are akin to absolutism and a barbarous type of procedure. Upon that record depends the enforcement of the supreme law of the land—the due administration of the law—and such record includes the pleadings and many other parts. The particular subject now under consideration is a fountain from which issue many rivulets all of which will clearly appear from the conserving principles of procedure.³ The conserving principles of procedure will be frequently mentioned hereafter and will be fully explained and impressed upon the mind of the reader. They are extremely important and are intimately involved with government. Everyone who does not show respect for the conserving principles of procedure and everyone who advocates the immolation of these principles by destroying the basis (mandatory record) upon which they depend does not work for the stability and utility of jurisprudence and its beneficent uses in government as Justinian and Bacon did. It is a fact that jurisprudence can be unfolded from a few maxims and that even one brief maxim may

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carry much instruction for its development and protection. All who denounce the maxims and write and teach in opposition to them should be reminded of the proverb, "Go to the ant, thou sluggard, consider her ways and be wise."

From the nature and reason of a thing the law begins and is unfolded. From nature and reason arise and flow many rules that are interactions. To illustrate, suppose the owner of both a dog and a monkey allowed each to go at large, and that a child should be bitten by either one or the other. Now, if the dog bit the child the owner would not be liable unless he knew the dog was savage by nature and would bite when he got a chance to do so; to hold the owner liable for the dog, knowledge of its propensity—the "scienter"—must be alleged and proved, as in all other cases where a domestic animal inflicts an unexpected injury. But it is otherwise with a monkey or other animal that is classed as ferocious by nature; the owner of that kind of animal must keep it confined at his peril; he is liable for injuries inflicted by it without alleging and proving the "scienter." In other words, "a dog is entitled to his first bite but the bear is not." Therefore more must be alleged and proved in the case of the dog than in the case of the monkey or a bear. And in such a case the pleadings can not be waived. If suit were brought for the bite of the monkey then no amount of evidence and forensic discussion about the dog would constitute a case for the bite of the latter. No doubt in such a case as the one supposed the dog's proximity and ability to bite might be discussed or referred to. But no amount of evidence or discussion could in any way change the nature of the case shown by the pleadings. All claims to the contrary would be fully met by the maxim, *Frustra probatur quod probatum non relevat* (It is vain to prove what is not alleged). The doctrine of the "theory of the case" is limited by the maxim last cited. By it the pleadings are limited and construed; and the pleadings limit the power or authority or jurisdiction of the court. We are now dealing with constitutional questions. In the sev-

1—See Hughes' Procedure. §§ 215-222; also p. 722.

2—*Expressio unius est exclusio alterius; Frustra probatur quod probatum non relevat; Actore non probante reus absolvitur; Semper præsumitur pro negante; De non apparentibus et non existentibus eadem est ratio.*

3—See §§ 83-123, Gr. & Rud.

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eral states where the foregoing propositions are rejected in practice, there result judicial oppression and anarchy. The pleadings are the foundation of the court's authority to proceed in a cause and for that authority the pleadings must ever be consulted. They are a fountain.

The fundamental principles of government have long been settled and reference is constantly made to them. The Roman had the same maxims we now have, and he vigorously and invincibly defended them. He confronted and informed Justinian that by the change of a definition or a single word in a maxim the powers of the crown could be enlarged while the rights of the citizen could likewise be diminished. The Roman reasoned from and measured by the maxims very much as the mathematician applies his rules or theorems, or as the theologian teaches from the ten commandments. The law is a great and liberal science and has its fundamentals as well as mathematics, astronomy, medicine and chemistry. These fundamentals of the law are forcefully and eloquently expressed by the use of the maxims. These maxims should be familiar to every devotee of the law and he should be able to refer readily to them and to cite them. Notwithstanding the apparent truth in the foregoing statements there are at the present time authors and teachers of the law who disregard its fundamentals and it often seems necessary to demonstrate to them that there are fundamentals of the law. However, these demonstrations can be easily made in all departments of science and nature.⁴ To illustrate, the art of navigation has always rested upon the same principles whatever may have been the appliances to produce locomotion. The principle of explosives is the same today as it was in the centuries past, whatever the modern improvements in their use may be. In these illustrations it is made plain that a change of appliances has not affected the old fundamental idea which develops from the nature of the thing. As it is with nature so it is with the law. The law in reality has no new principles; parliaments, congresses and

4—See Lampleigh: 301: cases.

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legislatures have not created any new principles; they have only altered appliances in some instances. This idea should be borne in mind in dealing with codes, practice acts, or any new statute or regulation. By way of illustration it may be shown that numerous decisions quote, discuss and follow the declaration of rights in Magna Charta;⁵ and likewise the preambles to constitutions. This particular one is often quoted and held up as a guidance:

"We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution of the United States of America."

The framers of this constitution had a certain and definite jurisprudence in view when they used the words "to establish justice." What they meant by that phrase may be discerned from the Federalist, also from *Marbury v. Madison*: 142, *Murray v. Hoboken Land Co.*: 219, *Windsor v. McVeigh*: 1, and *U. S. v. Cruikshank*: 232. These cases discuss the means of establishing justice. From all these authorities it is easily learned that it was intended to establish the due administration of the law after the model of the Free British Laws, the lack of which was a ground for revolution as proclaimed in our Declaration of Independence. It was maintained that the colonist had long suffered under alien and tyrannous laws while they were entitled to "Free British Laws." It is now evident that it is very important to know just what the term "Free British Laws" signifies, for it is very apparent that that term was regarded as a fountain from which many rivulets have issued.

It is a fact that "Free British Laws" ever required allegations and proofs. They were accusatory in principle, not inquisitorial, not condemnatory without both *allegata et probata*, with *coram judice* proceedings throughout. Under such laws what was not juridically presented could not be judicially considered;⁶

5—Murray: 219.

6—*De non apparentibus et non existentibus eadem est ratio*; U. S. v. Cruikshank: 232. See ALLEGATIONS; CODES.

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there must be allegations and there must be corresponding proof.⁷ The accused should be presumed innocent until he is proven guilty.⁸ The establishment of justice depends upon a judicial department with all those necessary and incidental means of carrying on the due administration of the laws or the enforcement of the supreme law of the land. What this is depends upon the judiciary. To form a union and to establish justice are the first two purposes declared by those who framed our constitution. History shows what means may be employed to establish, vindicate and perpetuate the first purpose or object. The second purpose or object has been a more recent work performed by our statesmen and jurists; and what they have done in this regard constitutes the juridical genius of our institutions. A leading question in the last mentioned field has been the division of state power, and the proper vindication of juridical means from legislative interference or limitations. To illustrate the importance of this matter attention is called to the prevailing view, that legislatures or statutes may declare what is *prima facie* proof of liability.⁹ Now, suppose a statute provided that the indictment or information, *ipso facto*, should constitute *prima facie* guilt, and without more or further proof to call for defense action. Logically it seems such a statute might so provide according to the decisions in many cases, though the effect of such a statute would be to change the very nature and structure of our government. Where such a statute is enforced the government is not accusatory. If everyone who were indicted were presumed guilty then who would be safe from tyranny and absolutism? These necessary and instructive views must be deduced from the fountain—the maxims—or “Free British Laws” which incorporate the maxims cited herein. From the foregoing views we can determine what was meant by establishing justice and what by implication should be its means of administration. To establish justice

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means to proceed judicially according to “due process of law.” Under these constitutional declarations a great deal must be supplied by implication.¹⁰ Supplying the means of establishing and administering justice signifies or imports the employment of liberal construction,¹¹ the proper use of which depends upon knowing the fountains from which the law is harmoniously and systematically developed. If the position here taken is tenable then the maxim, *Melius petere fontes quam sectari rivules*, is a basic rule of construction and synthesis. This view is an important and instructive one and should be well comprehended; and it supports the doctrine that the law is largely made and vindicated by the judiciary. This thought leads up to the conclusion that the nature and structure of government are a fountain from which extend numerous rivulets with tremendous ramifications; that the study of procedure is the study of government.¹²

Fundamental law is annexed by implication. Codes of procedure, indeed all statutes and constitutions, are construed to accord with fundamental law. Fundamental maxims of procedure are the “metwand” by which codes and practice acts are construed. They are construed to respect the mandatory record and the conserving principles of procedure. For the preservation of that record and maintenance of those principles construction expands or contracts the language to be construed. All statutes should be made to harmonize with fundamental requirements and with the grounds and rudiments of the law. In the construction of codes and practice acts older systems are considered (L.C. 216). Statutes create no new principles of procedure. The old law attends to regulate, guide and direct. Fundamental law is a silent factor that ever accompanies each and every subject of the law and it should be consulted in every act of construction. It does not arise from

10—Murray v. Hoboken Land Co.: 219; S. v. Bolden: 216; Hale v. Henkel; *Nemo tenetur*.

11—*Expressio eorum quae tacite insunt nihil operatur; Lex non exaete*; M'Culloch v. Maryland: 147.

12—U. S. v. Cruikshank: 232; Blake v. McClung; Burton v. U. S.; Murray v. Hoboken Land Co.: 219; Windsor: 1.

7—*Frustra probatur quod probatum non relevat*; Fish v. Cleland: 12c.

8—*Actore non probante reus absolvitur*; Coffin v. U. S.

9—S. v. Thomas: 257; S. v. Beach: 258.

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statutes but springs from the grounds and rudiments of law.¹³

M'Culloch v. Maryland was reasoned from the fountains. In answer to those who contended that the union was made by the states, Marshall, who spoke for the court, replied that the Union was made by the people, of the people and for the people. Procedure is reasoned from the fountains, and one kind is from the conserving principles of procedure (§§ 83-123, Gr. & Rud.), the other is indicated from this definition of pleadings, namely, "Pleadings are to apprise a defendant of what he must meet at the trial." See ILLINOIS. It is from this definition that very misleading texts are written, e. g., §§ 2310, 2311, 2 Thompson's Trials; 1 Bates' Pleading, Practice, Parties and Forms, §§ 511, 512. In these sections pleadings are viewed as the peasant sees the rivulet running across his lot; he does not see its origin in the snowflake on the mountain, how it melts and feeds the rivulet, the creek and next the river and finally its destiny in high seas. See THEORY OF THE CASE; VARIANCE.

In corporation law the rights, duties and powers of a corporation are reasoned from the kind which it was created. The purposes for which it was created are constantly sought and kept in view; this is well illustrated in that very instructive case, *Hill v. Boston*.

Courts often inquire *de hors* a record, over and beyond the nominal parties as to who is in interest, and who directs, controls and manages litigation; accordingly courts will hold him concluded who managed and directed the litigation, whether he was known upon the record or not. *Interest reipublice ut sit finis litium*. *Bauerman*: 48; *Lovejoy*: 289; *Cromwell*: 26.

Oral evidence is admissible to show who was the real party in interest; courts will not permit themselves to be deceived. *Lex non exacte*.

The leading features of the law of commercial paper are reasoned from a few equities. *Lickbarrow*: 394; *Swift v. Tyson*. In all considerations of commercial paper, its leading equities are kept in view. These equities are a fountain from which flow immense discussions. See BONA FIDE PURCHASERS.

Many criminal cases originate from contract and its obligations. In criminal prosecutions originating from contract, the contract is discussed and its nature and effect have to be considered. *R. v. Conde*; *R. v. Hughes*; *R. v. Kilham*; *R. v. Middleton*; *R. v. Mills*; *R. v. Mills*; *R. v. Morby*; *R. v. Negus*; *R. v. Redman*; *R. v. Smith*; *Shaffer v. S.*; *U. S. v. Standard*.

Intent is the leading element in criminal law. Act and intent must concur to constitute crime. *Actus non facit reum*. But it is the intent, its origin, proximity and operation that are often under investigation. *In fure*; *Qui primum peccat ille facit rixam*; *Scott (Squib Case)*; *Spies*

13—*In fure*; *Galbraith*; *PRESCRIPTIVE CONSTITUTION*.

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v. P.; *R. v.* — (cases); *C. v. Moore*. Discussions of these matters illustrate *Melius petere fontes*. *S. v. Bolden*: 216: cases.

MELLORS v. SHAW: Sub Hillard.

MEMORANDUM: *Wain*: 335; 2 *Bouv. Dic.* 395, *id.* 515 (note or memorandum), And *Dic.* See FRAUDS AND PERJURIES.

MEWACES: Obtaining property by. *McClain, C. L.* 728-742.

MENS REA: See *Actus non facit*, etc.

MERCANTILE AGENCIES: 27 *Cyc.* 473-477.

MERCHANTS: 27 *Cyc.* 478-482.

MERCHANTS' BANK v. STATE BANK (1870), 10 *Wall.* 604-676.

Agency; corporations. Usage or custom—course of business—system—may confer upon an agent authority to do an act. The agent of a corporation may be so empowered. A cashier was so authorized to certify checks. *Modus et conventio* cited and applied.

The fraud of the agent is the fraud of the principal. He who first trusted must first suffer. *Cornfoot*: 385; *Hern v. Nichols*, 1 *Salk.* 289, quoted and approved: *Qui sentit commodum*.

Corporations are liable for every wrong of which they are guilty, and in such cases the doctrine of ultra vires has no application. They are liable like natural persons for the acts of their agents. They are likewise bound by estoppel. *Cool. Torts*, 136, 2d ed.

A federal statute forbids banks to issue post notes, or "other notes," to circulate as money, other than the ordinary bank bills authorized by the bank. *Held*, this did not mean the certification of checks. *Ut res magis valeat*.

Province of judge and jury. In a civil case, there must be sufficient evidence to go to a jury. *Ryder*, cited and approved; also *Wheelton v. Hardisty*. See *Bonnell*: 185.

MEREST v. HERVEY (OR HARVEY) (1814), 5 *Taunt.* 442 (1 *E. C. L. R.*), 1 *Marsh.* 139, 15 *R. R.* 548, *Suth. Dam.*, *New. Def.*, *Para. Conts.*, *Add. Torts*, 2 *Gr. Ev.* 89, 253, 3 *Page Conts.* 1352, 1357, *Mews' E. C. L.* § 120, 136 *Hughes' Proc. Cited*, §§ 67, 296, 304, *Gr. & Rud.*

Exemplary damages. For knocking off a man's hat, £500 was awarded. 1 *Wat. Tres.* 3, *Moak, Torts*, rule 23, 1 *Add. Torts*, 455, 1 *Sedgk. Dam.* 350; *Sears v. Lyon* (1818), 2 *Stark.* 317 (3 *E. C. L. R.*), 20 *R. R.*, 8 *Rul. Cas.* 363; *Spelman*, 35 *S. C.* 475, 28 *Am. St.* 858-883, *ext. n.* (general review); *Fay v. Parker* (1873), 53 *N. H.* 342, 16 *Am. Rep.* 270-339, *n.*; *Suth. Dam.* Mere words cannot constitute a trespass, but they may aggravate and enhance damages. *Merest*; 1 *Wat. Tres.* 3.

Exemplary damages are allowed for criminal acts. *Cook v. Ellis* (1844), 6 *Hill*, 466, *Sedgk. L. C. Dam.* 741, 41 *Am. Dec.* 757, *Pattee Torts*, 21; 1 *Wat. Tres.* 284, 3 *Para. Conts.* 184, *Sedgk. Dam.* *Corporations are liable for.* *Craker; Milwaukee R. R.*, 91 *U. S.* 489, *Burdick, Torts*, 13 *L. R. A.* 600, *Suth. Dam.*, *Bish. Torts*, 3 *Para. Conts.*, 2 *Kent*, 15. Exemplary damages are too well established to be shaken; they rest securely on *stare decisis*. *Milwaukee Case*. But all courts cannot agree upon that, as many opposing cases show. *Generally*: *Wagner*: 290; *Suth. Dam.* See **DAMAGES**.

Malignous, wanton, fraudulent and oppres-

Merest.—

sive conduct or gross negligence is a ground for. Ten Hopen, 96 Mich. 236, 35 Am. St. 598, n.; *Woodenware Co.*, 106 U. S. 432, Burd. Torts, 154: cases, 22 Am. Law Reg. (N. S.) 677, *Suth. Dam.*; *Jewett*. Willful fraud is allowed in cases of. *Bigl. Fraud*, 513. Counsel fees not recoverable as vindictive damages. *Day v. Woodworth* (1851), 13 How. (U. S.) 363, *Sedgk. Lead. Cas. Dam.* 747, *Beale Dam.* 179. Expenses of litigation allowed. *Welch v. Durand* (1869), 36 Conn. 182, 4 Am. Rep. 55, 10 Am. Law Reg. 566-577, n.; *Bennett, sub Hadley, Suth. Dam.*; *Lovejoy*; *Mews' E. C. L. Are allowed in warranty cases.* *Hughes v. Graeme* (1864), Q. B. 335, *Sedgk. Lead. Cas. Dam.* 384, 3 Smith, L. C. 1681, 1815, 9th ed., 2 Smith, L. C. 394, 565, 2 Add. Conts. 1887, 1 *Suth. Dam.* 84, 85, 87; *Huff. Ag.*; *Sedgk. Dam.*, *Mews' E. C. L.*; *Westfield*, 122 Mass. 100, 23 Am. Rep. 292; *Pond*, 113 Mass. 114, *Beale Dam.* 183 (renunciation of agreement to arbitrate).

Principal liable for agent's wilful acts. *Ruepling*, 116 Wis. 625, 96 Am. St. 1013; *Craker*.

MERGE: Judgment; merger by. *Damon*, 17 Wash. 573, 61 Am. St. 927; *Bro. Max.* 329, 331, 337, 1 *Freem. Judg.* 315-345, 2 *Black, Judg.* 674-678, *Hughes, Conts.* 31; *Price*, 62 Kan. 735, 84 Am. St. 419, n.; *Hahl*, 3 Page Conts. 1352-1357; *ELECTION OF REMEDIES*; *Res adjudicata*.

Of crime. *White*: 175; 12 Cyc. 133.

Generally: 2 *Bouv. Dic.* 400, 406, *And. Dic.* See *White v. Fort*; 9 *Mews' E. C. L.*; *Forthman*, 206 Ill. 159, 99 Am. St. 145-171, ext. n. (of estates); § 294, *Gr. & Rud.* Of simple contract into a specialty. *Smith, Conts.* 29. *Contracts merge in judgment.* § 31, *Hughes, Conts.*; *Ans. Conts.* 316. *Of civil remedy into criminal.* *White v. Fort*; *Borden v. Fitch* (a bigamist liable in seduction). §§ 135, 322, 325, *Hughes' Proc.*

Pleading should be certain and show what is merged: for this certainty is required. See *PLEADINGS*. Giving note for antecedent debt, the latter does not merge. *Tobey*.

The greater contains the less: Omne majus. *White*: 175. Prosecution for a misdemeanor does not merge into felonies. *C. v. Robey*: 74.

Recoupment is an independent action and does not merge in a suit on the principal contract. *Mondel*: 77; *Kirven*. See *SPLITTING*.

MERITO BENEFICIUM LEGIS ADMITTIT, qui legem ipsam subvertere intendit: He justly loses the protection of the law who attempts to infringe the law. 2 *Inst.* 253. *Ilisley*; *Armory*: 180.

MERITS: Hearing on favored, p. 14, § 321, *Hughes' Proc.* *Kraner*: 299. See *ABATEMENT*.

The thirteenth conserving principle is to speed the disposition of causes upon their merits by disregarding formal or waivable matter or objections. This rule rests on *Interest reipublicæ ut sit finis litium*. See *ABATEMENT*; *WAIVER*; *Consensus tollit errorem*. § 103, *Gr. & Rud.*, Vol. I. This is a fundamental principle and should be well comprehended.

MERRYWEATHER v. NIXAN (1799), 8 T. R. (D. & E.) 186, 16 R. R. 810, 2 Sm. L. C. 542-548, 398-405 11th ed. (reviews English cases); *Keener, Quasi Conts.*

Merryweather.—

408, 19 L. R. A. 629, n., 3 *Mews' E. C. L.* *Sto. Ag. Whart.*, *Cool. Torts, Bish.*, *Add., New. Def.*, 1 *Wat.* 29, 63, *Pars. Conts.*, *Bish.*, *Chit.*, *Whart.*, 765, 771, 2 *Gr. Ev.* 115, *Greenh. Pub. Pol.* 214, *Bro. Max.* 728, *Brown, Jurisdic.*, 1 *Kinkead, Torts*, 84-85.

Merryweather stated: Contribution among wrongdoers; when allowed. *Merryweather* and *Nixan* were joint trespassers in destroying machinery in *Starkey's mill*, who sued them jointly and recovered £840, which M. satisfied in full. Afterwards he sued N. for £420, his half. *Held*, M. could not recover. § 158, *Hughes' Proc.*

Ex causa turpi, etc.; *Armstrong County*, 66 Pa. St. 218, 5 Am. Rep. 368, *Burd. Torts*, 166: stated, 16 Am. St. 257, *Keener, Quasi Conts.* 408; *Vandiver*, 97 Ala. 467, 19 L. R. A. 628, n. See *Bull.*

Contribution or indemnity between wrongdoers is sometimes valid. *Peck v. Ellis*; 2 *Gr. Ev.* 115, 2 *Suth. Dam.* 764; *Johnson*, 35 Neb. 604, 37 Am. St. 447 (when the parties are not in *pari delicto*); *Brooks*: 370; *Farwell*, 129 Ill. 26, 16 Am. St. 267, n., 6 L. R. A. 400; *Boyer*, 129 Pa. 324, 15 Am. St. 723, n.; *Westfield Gas*, 13 Ind. App. 481, 55 Am. St. 314; *Old Colony R. R.*, 148 Mass. 363, 12 Am. St. 558, n. *Contribution; subrogation.* *Dering. Indemnity contracts; when valid.* *Greenh. Pub. Pol.* 210-221, 326; 2 *Gr. Ev.* 115; *Lovejoy*.

METALLIC COMPRESSOR CO. v. R. R. (1872), 109 Mass. 277, 12 Am. Rep. 689, 2 *Thomp. Neg.* 1079: stated, 36 Am. St. 827, 64 L. R. A. 94 (in *jure non remota*); *Gilson v. Del. Co.* Cited, § 347, *Hughes' Proc.*

METWAND: "Statutes are construed by the golden metwand of the common law." See *CONSTRUCTION*; *C. v. Hess*: 215; *Murray*: 219; *Shick v. U. S.*; *MAXIMS*.

MEYER v. DELAWARE R. R. (1879), 100 U. S. 457-482, 25 L. Ed. 593, n. Removal of causes from state to federal courts. See *REMOVAL OF CAUSES*.

MIAMI R. R. v. WETMORE: *Sub M'Manus*.

MICHOUD v. GIBOD (1846), 4 How. (U. S.) 503, *Zinn, L. C. Trusts*, 43, *And. Am. Law, Brown Jurisdic.*; 122 Mich. 160, 80 Am. St. 548-568; *Huff. Ag.* Cited, §§ 150, 158a, 159 *Hughes' Proc.*; §§ 40, 66, 70, 281, *Gr. & Rud.*

A trustee cannot speculate in his trust. *Whart. Conts.* 161, 289; *Harrigan, sub MAGNA CHARTA*; *Keech*: cases; *Davoue v. Fanning*; *Green v. Winter*; *Boyd*: 62; *Huffc.*, *Reinh.*, *Tiff.*, *Agency*.

Purchase by agent of property of principal. 80 Am. St. 555-568, ext. n. See *Keech*. "Ye cannot serve God and Mammon," was ably and forcibly applied in that case. *Laches affects equitable remedies.* *Bostwick*, 116 Wis. 392.

MILITIA: 27 Cyc. 489-509.

MILLER v. DILL: L. C. 290b.

MILLER v. HORTON (1891), 152 Mass. 540, 32 Cent. Law. Jour. 246, 26 N. E. 100, 23 Am. St. 850, 10 L. R. A. 116. Cited, p. 8, *Hughes' Proc.*; § 296, *Gr. & Rud.*

Salus populi, etc. Right to kill animals or destroy property, or abate nuisances. Commissioners empowered by statute to condemn horses infected with contagious diseases, and "in all cases of farcy or glanders, having condemned an animal infected therewith," to kill the same. To

Miller v. Horton.

justify the killing of a horse, a health board must make jurisdictional facts affirmatively appear. *Galpin v. Page*. And these must be true in point of fact. Otherwise the board is liable in tort. *Miller v. Kempe's Lessee*: 115.

Statutory powers; right to exercise must be made affirmatively to appear upon the face of the record. See **TAXATION**; *Bloom*: 266; *Piper*: 114; *Omnia præsumuntur rite*; *Crepps*: 113. And they must be true in fact, *supra*, *Pearson*, 138 Ill. 48, 32 Am. St. 113, n.; *Fabula non judicium*, *Expressio unius*, etc., applies to; *Walker*: 118.

Nuisance; right to abate. *Grimes*, 126 Mo. 188, 47 Am. St. 653, n., 26 L. R. A. 638-646, n.; *Fertilizing Co.*; *Blue*, 155 Ind. 121, 80 Am. St. 195-234. See **NUISANCE**. 2 Beach. Pub. Corp. 1020-1039; *Lawton*, 152 U. S. 133; *Mugler*; *Millett v. P.*; **POLICE POWER**; *Semayne's Case*; *Brown*, *Jurisdic.*

Alcohol may be destroyed as a dangerous nuisance; may be abated. *Keller*, 45 S. C. 537, 55 Am. St. 785 (without notice or proceedings); *Fisher v. McGirr*, 2 Gr. Ev. § 629, stated in *Eureka*, 15 Utah, 67, 62 Am. St. 904; *Kirkland v. S.* (Ark. 1904), 65 L. R. A. 76, n. (intoxicating drink may be summarily destroyed). *McConnell v. McKillip* (1904), 71 Neb. 712, 65 L. R. A. 610 (destruction of gambling implements); *Dill*, *Beach*, Pub. Corp.; *Wilcox v. Hemming* (1883), 58 Wis. 144, 46 Am. Rep. 625 (impounding and selling animals permissible without judicial proceedings); *1 Beach*, Pub. Corp. 518, 527, 528; *1 Dill*, *Munic. Corp.* 546-548, citing *Donovan v. Vicksburg* (1855), 29 Miss. 247. *Contra* see *Blair*, 100 Mass. 136, 97 Am. Dec. 82-91 (summary seizure, sale or destruction of animals); *Fath*, 72 Wis. 289, 7 Am. St. 867; *Ross*, 83 Ark. 176, 119 Am. St. 131-136 (hogs killed to protect levees).

Health boards; power of. 2 Beach, Pub. Corp. 983-1019; *Potts*, 167 Ill. 67, 59 Am. St. 262, n.; *P. v. Board*, 140 N. Y. 1, 37 Am. St. 522, n. (notice before they act); *Health Dept.*, 145 N. Y. 32, 45 Am. St. 579 (have arbitrary power), 23 Am. St. 852 (property can only be condemned after an adjudication. *Audi*, etc.); *Cool*, *Const. Lim.* 444, 6th ed. *Quarantine powers*. *Hurst*, 102 Mich. 238, 47 Am. St. 525-552, ext. n., 26 L. R. A. 484-493, ext. n.; *Whidden*, 69 N. H. 142, 76 Am. St. 154, n.; *Markham*, 92 Am. Dec. 73-80 (quarantine regulations).

Power over buildings as nuisances. *Evansville*. See **DUE PROCESS OF LAW**; **POLICE POWER**.

Summary procedure to impound and sell animals. *Armstrong*, 106 Ky. 81, 90 Am. St. 207-220, ext. n.

MILLER v. HYDE (1894), 161 Mass. 472, 42 Am. St. 424-435, ext. n., 25 L. R. A. 42, n.

Cited, §§ 120, 137, *Hughes' Proc.*

Title to chattel does not vest in a trespasser by virtue of a judgment in trover against him. *Lovejoy*, 289; *Atwater*, 45 Conn. 144, 29 Am. Rep. 674; *Drake* (1877) 5 Chan. Div. 866; *Mews' E. C. L.*; *Brinsmead*, L. R. 7 C. P. 547; *Mews' E. C. L.* (*contra*), 1 Gr. Ev. 533; cases; *1 Benj. Sales*, 49, 2 Kent, 339; *Donald v. Suckling* (1866), L. R. 1 Q. B. 585, *Bigl. L. C. Torts*, 394-459 (what constitutes conversion), *Ball*, *Torts*, 352. See *Bro. Max*, 338; *Cool*, *Torts*, 597; *Adams v. Broughton* (1737), 1 *Strange*, 1078, *Andrews*, 18.

MILLER v. RACE (1758), 1 Burr. (Eng.) 452, 1 Sm. Lead. Cas. 838-862, ext. n., 8th ed., 463-490, 11th ed. (reviews English cases), *Ewart*, *Estoppel*, 385, 406, 1 Add. *Torts*, 479, 500; *Shaw*, 101 U. S. 557, 3 Kent, 79, *Rand. Com. Paper*, *Danl. N.*, *Pars. N.*, *Sto. Ag.*, *Whart.*, *Huff. & W.*; §§ 1, 8, 69, 81, *Hughes*, *Conts.*

Cited, pp. 36, 39; §§ 154, 184, 329, 331, *Hughes' Proc.*

Miller stated: *Bank notes; commercial paper; negotiable instruments pass upon delivery*. Highwaymen robbed a post-coach and took bank bills, whose owner gave notice to the bank, which accordingly refused to pay them when presented, and also retained the bills. *Held*, title to them passed on delivery, and that the *bona fide* holder could recover upon them. *Swift*.

Money passes on delivery. Possession of money is proof of ownership. *Miller*; *1 Benj. Sales*, 22. But not of chattels, if stolen. *Bentley*. Payment with stolen funds. Payee must receive the money *bona fide*. *Newhall*, 139 N. Y. 452, 36 Am. St. 412. A bailee of stolen money, with notice, is liable if he pays it. *Hindmarch*, 127 Pa. 284, 14 Am. St. 842, n., 4 L. R. A. 368, n.

Bank bills; nature of. 2 *Danl. Nego. Insts.* 1664-1697, 2 *Pars. N.* 88-106, *Huff. & W. Conts.*

MILLETT v. P. (1886), 117 Ill. 294, 57 Am. Rep. 869, *Myer*, *Vested Rights*, 157; *Baily v. P.* (1901), 190 Ill. 38, 83 Am. St. 116, n.; *Eddy*, *Combinations*; *Hughes*, *Conts.*; 3 *Page*, 1780.

Cited, 185 Mass. 18, 102 Am. St. 322; § 140, *Gr. & Rud.*

Individual and personal rights; limitations of legislative control: right of sovereign to regulate conduct of citizens. *Ritchie v. P.* (1895), 155 Ill. 98-123, 46 Am. St. 315-335, 29 L. R. A. 79, *McClain*, *Const. Cas.* 933; *Morgan*, 26 Colo. 415 (hours of work), 17 Am. St. 269-300, n., 47 L. R. A. 52, 65 L. R. A. 33-71. See **POLICE POWER**; *Fertilizing Co.*; *Harding v. P.* (1896), 160 Ill. 459, 52 Am. St. 344, n., 32 L. R. A. 455. See **SOVEREIGN POWER**; **MONOPOLY**; **RESTRAINT OF TRADE**; *Munn v. Ill.*; *Holden v. Hardy* (1898), 169 U. S. 366; *McClain*, *Const. Cas.* 929, 183 U. S. 21 (*state may regulate underground employment in mines*); *Short v. Bullion*, etc. Co. (1899), 20 Utah, 20, 45 L. R. A. 703; cases. *Contra*, *Morgan Case*; *Tiede*, *Pol. Power*. *Braceville Coal Co. v. P.* (1892), 147 Ill. 66, 37 Am. St. 206, n., 22 L. R. A. 340, 1 *Thayer*, *Const. Cas.* 923 (statutory regulation of employees); *Luman*, 46 L. R. A. 393; cases.

State may prohibit coloring oleomargarine. *McCray v. U. S.* (1904), 195 U. S. 27-100; cases.

Legislature may compel employers to pay cash to employees. *Knoxville Iron Co. v. Harbison* (1901), 183 U. S. 13; *Harbison Co.*, 103 Tenn. 421, 56 L. R. A. 318; cases; *S. v. Loomis*, 115 Mo. 307, 21 L. R. A. 789-810, ext. n.; *S. v. Buchanan* (1902), 29 Wash. 602, 92 Am. St. 930 (limiting hours of females).

Men may contract as they please if only they have capacity, and contract relating to a lawful subject-matter. The province of lawful contract abuts that of the police power. *Salus populi suprema lex* and *Sic utere tuo ut alienum non laedas*. 2 *Kinkadee*, *Torts*, 490; *Eddy*, 61-70; § 2, *Hughes*, *Conts.*

Right to contract. *Eddy*, *Comb.*, 62-70, 674, 681 (police power); *Cleveland*, 67 Ohio,

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197, 93 Am. St. 670; cases (liberty of contract cannot be abridged); Mathews v. P. (1903), 202 Ill. 389, 95 Am. St. 241, n.; Republic Co. v. S. (1903), 160 Ind. 379, 62 L. R. A. 136-144; cases (state cannot make employers pay weekly when the contract is to pay monthly). See POLICE POWER.

The power of government to interfere with the right of the citizen to contract depends on its interest. A lack of interest is the lack of power. An innocent act cannot be declared a crime. P. v. Turner. Nor can innocent dealings be forbidden by statute. The right to contract about matters that do not concern the state is a reserved right of the citizen, who has never surrendered all to the government and its agencies. See POLICE POWER; cases; CONSTITUTIONAL LAW.

MILLIGAN'S CASE (Ex parte) (1866), 4 Wall. 2, 18 L. ed. 281, 2 Thayer, Const. Cas. 2376; stated, Johnson v. Jones (1867), 44 Ill. 142, 92 Am. Dec. 159; cited, Cool. Torts, Cool. Const. Lim.; Kent, Com., Bish. L. C.; Treason Trials at Indianapolis; MARTIAL LAW; And. Am. Law, q. v.; Flournoy, § 350, Hughes' Proc.

Cited, §§ 61, 169, 263, 268, 294, Gr. & Rud. *Stability of law; stare decisis* essential for protection. 4 Wall. 120-121, quoted 190 U. S. 245. *Amplification of power to meet emergencies*. Cf. Merryman, Taney, C. C. Dec., Campbell, 246; Hawaii, 190 U. S. 245.

Where civil court could or might proceed, a court-martial cannot exercise any jurisdiction. Milligan. *Jurisdiction est potestas*, etc.; Walker: 118; *Ita lex scripta est*. Territorial jurisdiction. R. v. Keyn: 171; C. v. Macloon: 172; Windsor: 1; Piper: 114. See JURISDICTION.

MILLS: 27 Cyc. 509-514.

MILLS v. AURIOL (1780) (Auriol v. Mills), 4 T. R. 98, 1 Sm. Lead. Cas. 910-934, pp. 910-935, 7th ed. (a lessee is liable upon his express covenants after he assigns the lease, but not upon his implied covenants).

MILLS v. DURYEE: L. C. 57.

MILLS v. WYMAN: L. C. 316.

MILSTED v. BUTTE, etc. CO. (1896), 18 Mont. 199, 32 L. R. A. 697, n. Denials upon information and belief. Humphreys: 38.

MINER v. HARPERSETT (1874), 21 Wall. 162, 22 L. ed. 627. Allegiance and protection are reciprocal. See GOVERNMENT.

MINES: 2 Bouv. Dic. 126-129; And. Dic. Mines and Mining. See Boggs: 2 Bouv. Dic. 413-416; 27 Cyc. 516-792.

Must be located on public, unoccupied lands. Cleary, 28 Colo. 362, 89 Am. St. 207; Gemmell, 28 Mont. 331, 98 Am. St. 570 (posting notice before discovery is void).

Vein; what is. And. Dic. 1083. Right to pursue. Butte Min. Co., 23 Mont. 177, 75 Am. St. 505, n.; Calhoun Gold Co., 182 U. S. 499 (all lodes whose tops or apices are within the side lines belong to the locator; contra cases cited); Buffalo Co., 70 Ark. 525, 91 Am. St. 87, n. See Boggs.

Abandonment of; what is. Buffalo, supra. Mining partnership. Hartney, 10 Wyo. 346, 98 Am. St. 1005.

MINIME MUTANDA SUNT QUAE certam habuerunt interpretationem: Things which have had a certain inter-

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pretation are to be altered as little as possible. Coke, Litt. 365, *Omne innovatio*, etc. See *Stare Decisis*; CONSTRUCTION. Statutes in derogation of the common law are strictly construed. See MAXIMS.

MINTURN v. SEYMOUR (1820), 4 Johns. Ch. 497; Salmon v. Claggett (1830), 3 Bland. Ch. 125, 162, 1 Beach, Injunc. 299, 313.

Denials in an answer must be full and positive. Poor: 37; U. S. v. Parrott; Doll; Humphreys: 38. See *Dolus*, etc.; DISCOVERY.

MISCEGENATION: 27 Cyc. 489-508.

MISDEMEANOR: Crimes divided into felonies and misdemeanors. C. v. Roby: 74.

MISERA EST SERVITUS, UBI JUS est vagum aut incertum: It is a miserable slavery where the law is vague or uncertain. Coke, 4th Inst. 246. Uncertainty of law is miserable. See *Stare Decisis*; STABILITY OF LAW; Bro. Max. 150. *Ubi jus incertum, ibi jus nullum; Melius est jus deficiens quam jus incertum*.

MISJOINDER: May be waived. Harrigan v. Gilchrist, sub MAGNA CHARTA. Not a ground of general demurrer. See Williams v. Bankhead; Rice v. Shute; 2 Bouv. Dic. 421.

Trial; joint trespassers; when fatal. Dutton v. Lansdowne Borough (1901), 198 Pa. 563, 48 Atl. 494, 82 Am. St. 814.

Of counts, causes and defenses. Bell v. Brown; Haskel: 101; Brugger: 162.

MISNOMER: Wiehold v. Herman; 2 Bouv. Dic. 422. Names of parties essential. Wiehold v. Herman.

MISREPRESENTATION: See DECEIT; Pasley v. Freeman: 375; Chandelor: 374; Jenkins v. Long; Ans. Conts. 121, 136, 137, 145, 146-151, n. Ewart, Eetoppel, 2 Bouv. Dic. 423, 424, And. Dic. *Avoid contracts*. § 13, Hughes, Conts.; Pasley v. Freeman: 375; 1 Page, Conts. 69, 70, 20 Cyc. 1-149. See FRAUD.

MISSISSINEWA MIN. CO. v. PATTON (1891), 129 Ind. 472, 28 Am. St. 203, 58 id. 179.

The statement of a pleading controls its caption in case of repugnancy. And also the prayer. Cf. Russell v. Shurtleff; Jackson v. Ashton.

MISSOURI: Much may be judged of the condition of Procedure in this state, from the following: Malinckrodt: 12a; Roden: 12b; Smith v. Burrus; Chitty v. R. R.; Well v. Green County (1876), 69 Mo. 281, 286; cases (allegations must exist). These cases stand for fundamental maxims. Chitty is incompatible with the theory of the case. It is like Fish v. Cleland (Ill.): 12c. Both sustain *Frustra probatur*, etc. Chitty also instructively applies *Verba generalia*, etc. The right record must speak, and binds. Matter belonging to the mandatory record is surplusage, if put in the statutory. Hill v. Butler Co., 195 Mo. 511 ("We have decided this again and again"). A judgment depends on the pleadings. Campbell v. Greer: 2a, q. v.; Malinckrodt: 12a.

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On the other hand the theory of the case is upheld; variances are waived. These are viewed as affecting the adverse side only. *Bragg v. R. R.* (1905), 192 Mo. 331-366; *Mellor v. R. R.* (1891), 105 Mo. 455, 469. *Bragg* and *Mellor* quote statutes directing liberal rules and tolerating variances. These are exceedingly reactionary. See 5th, 8th and 9th clauses, 105 Mo. 469, § 672, Act of 1899 (Code); *Rushton*: 5; *J'Anson*: 91; *Dovaston*: 217. Negligence, deceit and delays as to objections are reprehended. But very, indeed extremely, inconsistent cases are found. It is unbelievable that courts will require records and record matters, and profess to be bound thereby in one case, and in the next, construe the record out of the scheme, and declare what they believe for the record. To illustrate we quote:

"The state took this appeal and made up the bill of exceptions. We are satisfied the only contested issue below was whether Fasse was a taxpayer within the meaning of the statutes, and that no point was made about his lacking other qualifications. We are also convinced that he proved he was a citizen, and that he was sworn into office in time, which proof was omitted from the bill of exceptions, simply because there was no contention that he was disqualified by lack of citizenship, or that he failed to take the official oath; in fact, as much as was stated by the counsel for respondent, in his brief, and also on argument in this court, in the relator's presence, and was not denied by the latter." *S. v. Fasse* (1905), 189 Mo. 532, 537. See *Mobley v. Nave*: 46a; *Mallinckrodt*: 12a; quoted *sub* THEORY.

This quotation will support many propositions, destructive of a protecting procedure. Here it may be observed that the state prepared the bill of exceptions, as necessarily an appellant must; this was regular. Issues should not appear in the statutory record; the respective uses of records can not be jumbled and intermixed. If the statutory record was made of record for any purpose, then what it properly showed was exclusive of all other matters. What it did not juridically present could not be judicially considered in a court of errors. The court might believe whatever it chose, but it could not act upon its beliefs, if its convictions were not founded upon the record. Carving out and setting up record matter from forensic hustings, and the silence of a party sitting in court, listening to a

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case submitted by a record, is opposed to myriads of cases. *De non apparentibus*, etc.; *U. S. v. Cruikshank*: 232. Cases that deny the rule: "What ought to be of record must be proved by record, and by the right record," are opposed to equal and uniform law, *Ubi jus incertum, ibi jus nullum*. In another case a plea of *res adjudicata* was declared, and applied from forensic oral admissions made at a trial, although the rules are that record matter must support estoppel of record, and that defenses not pleaded are waived. *Matousek v. Catholic Union* (1905), 192 Mo. 588, 596; *Hogan v. Hinchey* (1905), 195 Mo. 527 (one can not invite error, and then complain of it); *Ricketts v. Hart* (1899), 150 Mo. 64; *Roden*: 12b (a reply may be waived); *Campbell*: 2a; *Benton. Frustra probatur quod probatum non relevat. Waldhier v. R. R.* (1880), 71 Mo. 514. This case is as strict as *Bristow*: 135. This case is expressly quoted and followed and *Mansfield* commended in *Dunlap v. Kelly*, 105 Mo. Ap. 1. Pleadings and variances are viewed as a concern of the parties upon the record only; also that legislatures enact the substantial rules of Procedure ("One cannot sue for a horse and recover a cow"). *Mallinckrodt*: 12a. Descriptive allegations must be proved as laid. *Beck v. Ferrara*, 19 Mo. 30, stated and followed. The mandatory record is respected on the one hand (*Roden*: 12b; *Mallinckrodt*: 12a), while the theory of the case is maintained on the other. *Devoy v. R. R.*, 192 Mo. 201 (pleadings are waived, 2 *Thomp. Tri.* 2310, 2311). General objections and exceptions are upheld. *S. v. Noland* (1892), 111 Mo. 473, 493 (*contra* cases in Indiana denied). See § 53, Gr. & Rud. (Convenience); *Chapman v. Ensberg* (1902), 99 Mo. Ap. 127 ("We permit it—a motion for a new trial—to be as unspecific as the ingenuity of a defeated lawyer can find language in which to conceal what he really means." Statute requiring certainty and convenience was quoted and expressly nullified). *S. v. Franke* (1900), 159 Mo. 531, 535 (general assignments insufficient). See *L.C.* 296-299; *Collier v. Catherine Co.* (1907), 208 Mo. 246, 106 S. W. 971-974 (motions for new trial may be general).

The prescriptive constitution is

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recognized in many cases; many cases are founded upon the maxims and follow them as guides. *S. ex rel. Henson v. Sheppard*; Dawson, 89 Mo. App. 245; *S. v. Van Wye*, 136 Mo. 227, 58 Am. St. 627; 66 Cent. L. J. 368.

Matter of exception, or waivable matter, must be objected and excepted to at the time of the trial, and this matter be again presented in a motion for a new trial, so error can be assigned upon it in the Appellate Court. Otherwise, such matter is waived, and cannot be reviewed. *S. v. Hottman* (1906), 196 Mo. 111. See *Consensus*, etc.; also L.C. 296. In Hottman case (murder), the court opened the statutory record *sua sponte*, the prisoner having no counsel. *S. P.*, *S. v. Modlin*, 197 Mo. 376 (court *sua sponte* examined the mandatory record, and reversed the case because the verdict was a departure). See *Roden v. Helm*: 12b. The *coram non judge* proceeding is void *ab initio*, and is incurable by waiver or consent, or conduct. Harkness: 152: cases. *S. v. Sheppard* sustains the view that there is an unwritten constitution. *Lex non exacte*, etc. *S. v. Van Wye*, 136 Mo. 227, 58 Am. St. 627; 66 Cent. L. J. 368. The decisions relating to the denial do not support the view that pleadings are to limit issues and to narrow proofs. The general issue and denial are upheld. See Dickson: 34; *Mutual Life, post*.

The common counts have not been injected by construction.

The motion for a new trial and the assignment of errors are essential to confer jurisdiction of exception matter. 105 Mo. App. 694.

The *Rushton*, *Bristow*, *Dovaston* and *J'Anson* cases are often upheld with great strictness.

Prominent writers and jurists of the state wrote and decided that pleadings could be waived. 2 Thomp. Tri. 2310-2311. This was followed by legislation, that might well be gathered under this title: An act to abolish the prescriptive constitution, its maxims as guides, as reason, as morals and as necessity, also the conserving principles and the mandatory record and all upon which those principles depend. Such is the statute of jeofails in that state, also in Illinois. This statute stands for the most extravagant conceptions of the theory of the case and of liberal construction. It is inimical to the maxim, *Frustra pro-*

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batur quod probatum non relevat, also *Verba fortius accipiuntur contra proferentem*. Many of the cases pay no respect whatever to the conserving principles of procedure. See §§ 83-123, Gr. & Rud.; CODES. Technicalities upon which depend important principles are constantly denounced. If maxims are cited these are sometimes referred to as the rules and language of the "older school" and "writers."

Naturally the judiciary were called upon by a large part of the bar and all of the public sentiment the lawyers could arouse to follow implicitly such writings, such jurists and such legislation. 66 Cent. L. J. 347. The attempt to do so has brought chaos into the official reports. The bewilderment is profound, and the natural, direct and probable results must follow. The decisions of the state are not only in discord with the maxims of the prescriptive constitution, but they are antinomous among themselves; still they are no worse than those of other theory of the case states. See ILLINOIS. In all of these states a condition is prevailing that is calling for the efforts of their jurists and statesmen, who have always been called to give or to restore and rectify attacks upon jurisprudence. See Indianapolis: 223; Rush-ton: 5; Dovaston: 217; CODES.

Defining the mandatory (judgment) record as a necessity to support the issuance of an execution, also support an execution or judicial sale, also necessary for appellate procedure, to resist objections upon collateral attack, also for purposes of *res adjudicata*, the mischiefs of the Missouri, Illinois and Indiana statutes of Jeofails will appear. See also OHIO; MANDATORY RECORD; CONSERVING PRINCIPLES.

These statutes are far more confusing, more difficult to grasp and comprehend than is the rule in *Shelley's Case*; this is referred to in relation to *Dovaston*: 217. See also, Bouv. Dic.: *SHELLEY'S CASE*.

From necessity, the maxims *De non apparentibus*, *Frustra probatur* and *Verba fortius* depend on technicalities. These are upheld on one hand and they are assailed on the other. See Preface: DATUM POSTS.

How *Bristow v. Wright*: 135 is regarded may be judged from the discussion of that case—"Bristow v.

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Wright, Doug. (Mich.) 664"—as a notable writer cites it in his table. He discusses this case along with many Missouri cases. 2 Thomp. Tri. 2257. He thought this case was denied by Marshall in *Wilson v. Codman*, 3 Cranch, 193. But as to this he was also mistaken. Still greater are his misconceptions in §§ 2310, 2311, *id.* The incongruities of plausible authors seem to have infected and misled many courts. See also, 1 Bates, Pl., Pr., Parties and Forms, 511, 512; THEORY OF THE CASE; VARIANCE; WAIVER; *Verba fortius.*

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Ry. Co. v. Wood (1902), 95 Tex. 233, 66 S. W. 449, 93 Am. St. 834-855, ext. n. Cited, Burdick's Torts; § 296, Gr. & Rud. Tort; omission of duty. Case stated: Infectious disease; right of action in favor of person contracting. When the duty to prevent the spread of a contagious disease rests upon a corporation or private person, an obligation arises in favor of each member of the community and a right of action accrues in favor of him who suffers from its breach. 93 Am. St. 838. See Torts; notes to *Gilson v. Delaware*, 36 Am. St. 308-361.

Railway corporations. Maintaining hospitals; liability of for the escape of persons suffering from contagious diseases. If a railway corporation maintaining a hospital for its employees suffers one of them, while delirious from smallpox, to escape from the detention camp and thereby to communicate the disease to another, the latter may recover of the corporation for the damages thus inflicted on him, if it, or any of its employees, was guilty of negligence to which such escape was due. 93 Am. St. 839; *R. R. v. Lockwood*: 352.

Negligence in permitting the escape of smallpox patients; what is. The diligence required of a railway corporation maintaining a hospital or detention camp in which one of its employees was confined while suffering from smallpox depends on the character of the disease and the danger of communicating it to others. It assumes the duty of using ordinary care to prevent him from exposing himself in delirium or being exposed otherwise so as to communicate the disease to others. 93 Am. St. 839, 840.

Torts defined: *Sic utere*, etc.; Blyth; *Carter v. Towne*. See Hughes' Conts., Preface; N. P. R. R., 192 U. S. 440, 452; cases; Collins (R. I.), 64 L. R. A. 156 (failure to provide servant shelter). *King v. Ford* (1816), 1 Stark. (Eng.) 421 (2 E. C. L. R. 163); 18 R. R. 794, 10 Mews' E. C. L. 212 (Nuisance); 12 *id.* 630 (school and school board).

A school-master who permits an infant pupil under his care to make use of fire-works is responsible in an action for the mischief which ensues. But if the declaration alleges that the defendant (in such an action) delivered the fire-works to the pupil, or caused and procured them to

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be delivered to him, and it turn out that although the defendant had permitted the use of fire-works by his pupils, the fire-works from which mischief resulted had, in fact, been delivered to the pupil by another person without the authority or knowledge of the defendant, the variance will be fatal. (*Allegata et probata* must correspond.) See *Squib Case*; *C. v. Moore*.

MISTAKE: Hunt v. Rousmanier; *Brown v. Lamphear*: 347; cases; 1 Page, Conts. 62-86, 9 Cyc. 385. §306, Gr. & Rud.

In contracts; relief from. *Gordon v. Gordon*; *Lansdowne*; 2 Bouv. Dic. 427; Ans. Conts. 122-130, 320; Whart. 171-211; Hughes, 112-121; 2 Page, 1237-1254.

Unilateral mistake corrected. Bibber, 101 Mo. 59, 115 Am. St. 303 (generally mutual mistake is required).

Effect on contracts. *Wheaton*: cases; *Ignorantia facti excusat*; 1 Page, Conts. 155-175.

Of fact. McClain, C. L. 133. *Actus non facit.* Will excuse. *Ignorantia facti*; *Levett's Case.* *Of law is no excuse.* *Ignorantia legis neminem excusat*; *R. v. Esop.* Mistake as a defense to crime. McClain, C. L. 131-135; *Levett's Case.*

Mistake in executing documents. § 122, Hughes' Conts., Ans. Conts. 124; Laws. Conts. 212; *Williams v. Stoll*; *Foster* (1869), L. R. 4 C. P. 704; McGinn, 62 Mich. 252, 4 Am. St. 848.

As to party contracted with. Boston: 320.

Mistake of law and of fact in compromises. § 122, Hughes' Conts.

Mistaking the effect of a pleading or of a proceeding does not bind; one may always object to the *coram non judice* proceeding. *Harkness*: 152; *Campbell*: 2. Consent, waiver and acquiescence will not cure it. See COLLATERAL ATTACK; *De non apparentibus*, etc.

MITCHELL v. KINGMAN: L.C. 415.

MITCHELL v. REED (1858), 9 Cal. 204, 70 Am. Dec. 647 (acquiescence in statements made in one's presence will estop). *Allegans contraria*, etc. See *Borkenhagen v. Paschen*: 81.

MITCHEL v. REYNOLDS: L.C. 372.

MITIGATION: Matters of; pleading of. *McKyring v. Bull*: 33; 2 Bouv. Dic. It may be shown that plaintiff's husband was familiar with other women in a suit for alienating his affections. *Angell*, 26 R. I. 160, 166 Am. St. 707, n.

MOBLEY v. HAYE: L.C. 464.

MODICA CIRCUMSTANTIA FACTI *ius mutat*: A small circumstance attending an act may change the law. With whom the idea originates of advancing the consideration for a contract or demand, is of much consequence in law. *Lampligh*: 301; *Bartholomew*: 302. Where the fire spontaneously arises from combustibles negligently placed in proximity to another's property, is a leading fact in some cases. *Fent*; *Scott v. Shepherd*: cases; *Missouri*, K. & T. R. R. Slight circumstances free or charge one as a joint trespasser. *Spies v. P.* *Ex facto oritur ius.* See *Squib Case* and *Vosburgh*. *Similitudo legalis*, etc. So. R. R. v. Phillips, 100 Tenn. 130, 42 S. W. 925 (amusing and instructive illustration). *Omnis definitio in jure civili*, etc.; *Dissimilium dissimilis*, etc.; *Cessante ratio*, etc.

MODUS ET CONVENTIO VINCIUNT *legem*: The form of agreement and the convention of the parties overrule the law.

Modus et Conventio.—

Bro. Max. 689-698. Max. No. 30, §§ 297-302; §§ 149, 158, 169a, Hughes' Proc.; *Non hæc; Pacta dant.* See **WAIVER**.

Merchants' Bank; French v. Miller; Scott v. Avery; Kemble; Sloman; Peachy; Seton; Lyon; Barnard; Robinson; Taylor; Hallett v. Wylie; Polack. See **Consensus**, etc.; 2 Coke, 73; Wayman v. Southard (1825), 10 Wheat. 1; Jones, Construc. 22 (the principle recognized, that in every forum a contract is governed by the law with a view to which it was made); Mills, 94 Tenn. 651, 45 Am. St. 763, n. (exemption laws).

Constitutional rights may be waived. Kelly: 285; cases; Winona Case; Work v. S.: 242. Sovereignty may consent to be sued, may waive its immunity. Clark v. Barnard (1883), 108 U. S. 436, 27 L. ed. 780, Cool. Const. Lim. 17. See **Hunsaker v. Borden**.

And pre-payment of premium for insurance may be waived. Farnum v. Phoenix Ins. Co. (1890), 83 Cal. 246, 23 Pac. 869, 2 Am. R. R. & Corp. Rep. 72, 3 Kent, 376, n.

Conditions in a policy may be orally waived, although the policy forbids this. Carey v. German, etc. Co. (1893), 84 Wis. 80, 36 Am. St. 907, n.; 20 L. R. A. 287; *contra*: Wheaton, 76 Cal. 415, 9 Am. St. 216-238, ext. n.; Johnson v. Ins. Co., 123 Ga. 413, 107 Am. St. 92-149, ext. n. Parties cannot stipulate for an irrevocable contract. Bro. Max. 697, n. *Nihil tam conveniens*.

A man may waive any right he has, whether secured to him by contract, by statute or constitution. P. v. Commissioners, 174 N. Y. 450, 95 Am. St. 596; Osgood v. R. R.

Limitation of actions; contracts for. Fireman's Fund Ins. Co., 38 Neb. 150, 41 Am. St. 727, n.; Little, 123 Mass. 380, 25 Am. Rep. 96-107, n.; Hart, 86 Wis. 77, 39 Am. St. 867, n.; 21 L. R. A. 743. *Contra*, Miller, 54 Neb. 121, 69 Am. St. 709, n. The bar of the statute of limitations and of bankruptcy may be waived.

A new promise revives the original debt. *Trueman v. Fenton*. Contract may provide for demand and for time when suit shall be brought. Hill, 85 Ga. 425, 21 Am. St. 166, 3 Am. R. R. & Corp. Rep. 400-406, n.; cases; Greenh. Pub. Pol. 505; cases. Demand, if required, must be made according to contract or within the statutory period. Reizenstein, 75 Iowa, 294, 9 Am. St. 477, 1 L. R. A. 318. But limitations and exemptions (Mills v. Bennett) cannot be waived in the formation of the contract, nor can limitations be contracted for a longer period than the statute provides for reasons of public policy. *Salus populi*.

Gross negligence; fraud. Immunity from cannot be stipulated for. *Pactis privatorum*, etc.; *Nulla pactio*, etc.; Bro. Max. 396, 397; Hollister; Railway: 352; Greenh. Pub. Pol. 610-612, 620; § 18, Hughes' Conts.

MOGUL CASE: See Allen v. Flood; Lumley; 195 U. S. 203, 204; § 296, Gr. & Rud.

MOHE v. MANIERRE: L.C. 68.

MOLTON v. CAMBOUX: L.C. 413.

MOLLER v. GATES LAND CO. (1903), 119 Wis. 548.

Moller stated: The terms of a contract may be gathered from a course of dealing. An agent presenting an expense account and claims for commissions on sales over and above a salary paid him through eighteen months, to which no objection

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is made, and who is encouraged to continue in the service, may recover upon such accounts rendered. The defendant is estopped. *Maheer v. S.*

Equitable estoppel binds. He who does not speak when he ought shall not be allowed to speak when he desires. Bro. Max. 138.

Accepting and acting upon an unsigned contract binds one. Forthman, 206 Ill. 159, 99 Am. St. 145; Clayton v. Blakey (renewal of leases); White v. Corlies: 303; 2 Page, Conts. 64.

MONDEL v. STEEL: L.C. 77.

MONEY: See **GOLD DOLLAR**; "Half Dime," Bouv. Dic.; "Half Dollar," Bouv. Dic.; "Money," Bouv. Dic. 432; Suth. Dam. 205-211; 27 Cyc. 817-822. *Passes on delivery.* Miller v. Race. Possession is proof of ownership. Miller.

MONEY HAD AND RECEIVED: Action of. *Bank of U. S. v. Bank of Washington* (1832), 6 Pet. (U. S.) 8, 8 L. ed. 327-334, n.; *Atty. Gen. v. Perry* (1735), 2 Comyn, 481; *Soderberg v. King Co.* (1896), 15 Wash. 194, 56 Am. St. 878, n.; 2 Bouv. Dic. 433; *Wells v. Brigham* (1850), 6 Cush. (Mass.) 6, 52 Am. Dec. 750-760, n.; 1 Chit. Pl. 362-366, 2 Chit. Conts. 876-970; *Gr. Pub. Pol.* 76-86; 4 *Walt's Ac. & Def.* 444-512; *Whyte v. Rosencrants* (1896), 128 Cal. 634, 69 Am. St. 90, n.; *Ans. Conts.* 135, 191, 200, 201, 366, 367. §§ 307, 314, Hughes' Proc.

Restitution of land under a reversed judgment. *Bank of U. S. v. Bank of Washington*, *supra*; *Quan, etc. Co. v. Laumeister* (1890), 83 Cal. 384, 17 Am. St. 261, n.; *Singly v. Warren* (1898), 18 Wash. 434, 63 Am. St. 896, n.; *Galpin v. Page* (1874), 3 Sawyer, 93. Reversed judgment: validity of acts done under it. *Bridges v. McAllister* (1899), 21 Ky. Law Rep. 428, 45 L. R. A. 800-804, n.; Suth. Dam. 468, 469.

Action will lie where there is a failure of consideration. *Cumber v. Wane*: 311; cases.

Subrogation; contribution. *Dering v. Winchelsea*.

Generally: 2 Whart. Conts. 722-755. Money paid to another's use. 2 Whart. Conts. 756-771. Money counts. 9 Mews' E. C. L. 305-378; 27 Cyc. 825-887. See *Qui sentit commodum sentit debet et onus*.

MONITION: Summons; Warning.

MONOPOLY: *Lewson's Cases on Trusts and Monopolies*; *Eddy, Combinations*, 1-35; *And. Am. Law*, 777, 778. Restraint of trade. *Millett v. P.*; *Charles River Bridge Co. v. Warren Bridge*; *Munn v. Illinois*; *Mitchel v. Reynolds*; *And. Dic.*; 27 Cyc. 888-910.

MONROE DOCTRINE: 2 Bouv. Dic. 435.

MONTAGUE: See **HUSBAND AND WIFE**.

MONTANA CATHOLIC MISSION v. Missoula County: L.C. 106.

MONTGOMERY v. EDWARDS: L.C. 292.

MONTGOMERY v. S. (1907), 53 Fla. 115, 45 So. 879, 66 Cent. L. J.

Strauder v. W. Va. cited and followed as to rights of negroes under the XIV Amendment. *Constitution of the United States*. Where juries are selected wholly from whites and blacks are wittingly excluded therefrom the venire should be quashed, also an indictment founded upon such proceedings. *S. P., Farrow v. S.*, — Miss. —, 45 So. 619 (cites for authority, § 4, Art. 4, also Amendments 5, 6, 14, Const. U. S. See *Barron*: 241).

Montgomery v. S.—

System—Res ipsa loquitur. Where successive juries are selected wholly from whites, where blacks predominate in numbers, this fact carries with it a presumption that negro jurors are excluded by design and purpose.

If objectionable evidence is admitted without objection, this is waived and the evidence will be given effect to as if competent in all particulars.

MONTGOMERY BEER BOTTLING

Works v. Gaston: L.C. 47.

MONTH: 2 Bouv. Dic. 437.**MONTOUR v. FURDY (1865), 11 Min. 384, 88 Am. Dec. 88-95, n.**

Denial of "each and every allegation" insufficient. Doll v. Good. See DENIALS; Chicago R. R. v. Lundstrom (1894), 16 Neb. 254, 20 N. W. 198 (such are aided); Burke v. Ass'n (1901), 25 Mont. 315, 64 Pac. 879, 87 Am. St. 416; Garland v. Gaines (defective raises no issue); Dickson: 34; *Dolus versatur*, etc.

MOODY v. BROWN: Sub FRAUDS AND PERJURIES; Lee: 338.

MOORE v. C. (Indictments must set forth a crime with certainty. Every presumption is against a pleader. U. S. v. Cruikshank: 232; Dovaston v. Payne: 217): L.C. 21.

MORALITY: How far enforced by law. Trist: 214. See CHRISTIANITY; INTELLIGENCE; Church v. U. S.; Burton v. U. S. A bawdy house cannot enforce telephone service. Goldwin, 136 N. C. 58, 67 L. R. A. 251.

It is the basis of construction. Eddy, Combinations, 66. See § 14, Hughes' Proc.; §§ 10, 46, 47, 52, 71, 122, 152, 166, 177, 288, Gr. & Rud.

COGNATE MAXIMS AND CASES: *Juris præcepta sunt hæc, honeste vivere, alterum non ledere, suum cuique tribuere; Verba fortius accipiuntur contra proferentem; Allegans contraria non est audiendus; Falsus in uno falsus in omnibus; Nullus commodum capere potest de injuria sua propria; Nemo debet esse iudex in propria sua causa; Summa ratio est quæ pro religione facit; In pari delicto, etc.; Ex nudo pacto.*

CASES: Trist: 214; Church v. U. S.; S. ex rel. Henson v. Sheppard; P. v. Turner: 252; Oakley v. Aspinwall; Riggs v. Palmer; Burton v. U. S.; Keech v. Sandford (instructive illustrations); Michoud v. Girod; Graver: 103 (false and sham pleadings); Dickson: 34 (sham denials are disregarded).

The basic element in construction. Eddy Comb. 66; Trist: 214.

Morality is a ground and rudiment of law. §§ 15, 46-52, 71, 122, 123, 152, 166, 177, 288, Gr. & Rud.

It deserves to be irrelatively and singularly considered. For that citations to the above sections are made. See and likewise pursue and consider *Summa ratio est quæ pro religione facit*. In the light of the above consider what is mentioned in relation to certainty and pleadings. They involve morality a ground and rudiment of law. §§ 46-52, 71, Gr. & Rud. See CERTAINTY; SHAM PLEADINGS; DENIAL; Dickson: 34; Humphreys: 38 (code: denials); Poor: 37 (equity); Pain: 107 (repugnancy).

Sham and false pleadings do not confer jurisdiction. Graver: 103; Wonderly: 102; Barr: 265. Reference to citations of these cases show the ramifications of

Morality.—

morality throughout procedure. See also, *Allegans contraria; Falsus in uno; Nullus commodum capere.*

Morals are a part of the higher law. Oakley: 222; Trist: 214; In part, etc.; Piper, sub Ashby: 273; § 123, Gr. & Rud.

Summa ratio est quæ pro religione facit. Graver: 103; Keech (instructive illustrations); Riggs.

Equity founded on the civil law regarded the conscience. Collins v. Blanton. Illegality repressed. See In pari delicto, etc.; Holman: 363; EQUITY: maxims; 2 Mech. Sales, 1050.

Injunctions will protect. Hamilton: 280. Crime enjoined under some circumstances.

Morality is interpreted into constitutions. Trist: 214; Oakley. No man can be judge of his own dispute. *Nemo debet esse iudex.* Rights cannot be founded on fraud. See FRAUD; Riggs.

Legislation protects and represses crime. See POLICE POWER; Barber v. Connolly; And. Am. Law, 353, 457, 461. Falsehood and deceit repressed. Graver: 103.

Morality considered in procedure. Oscanvan: 41; Beaumont: 367; Horn v. Cole; Pickard; Smith v. Hodson: 156. *Allegans contraria*, etc.; Graver: 103; Borden: 267. *Bona fide* conduct demanded in procedure. *Allegans suam turpitudinem non est audiendus.* 1 Gr. Ev. 383; 1 Wig. 529.

"The rules of evidence arise from the charities of religion—the philosophy of nature—the truths of history—and the experience of common life." 1 Gr. Ev. 584.

Construction for morality is favored. Trist: 214. §§ 5-5b, Hughes' Proc. See CHRISTIANITY; Riggs.

Pleadings should be true. Wonderly: 102; Graver: 103; Borden: 267.

Every presumption against a pleader, is a rule of morality. See Dovaston: 217. The structure of government rests on. And. Am. Law, 168, n.; *Allegans contraria*, etc. See GOVERNMENT.

Denials should be true. And. Dic. 329. Affidavits of merits are often required. Sub Dickson: 34.

Affidavits of merits are construed to impose obligations and duties and to establish rights, when the fact is they are at most but affirmative statutes. No statute is necessary to protect a litigant from false and sham pleadings in a court recognizing and enforcing first principles.

Courts may direct that issues be limited and proofs narrowed so that departures, variances and generalities may be made impossible. Kollock v. Scribner. Also order bills of particulars. Cryps; C. v. Snelling; *Lex non exacte.*

MORAL OBLIGATION: No consideration. Cumber: 311; Lee: 318; Ans. Conts. 79, 80, 101.

MORA REPROBATUR IN LEGE: Delay is disapproved of in law. Jenk. Cent. 51 (Delay). See Waco: 300.

MORGAN v. COX (1856), 22 Mo. 373, 66 Am. Dec. 625; 1 Thomp. Neg. 239-248; cited Cool. Torts, sub Coggs; Brown v. Kendall. Cited, § 348, Hughes' Proc.

Fire arms; great care required in use of. Morgan v. Cox; Underwood v. Hewson (1724), Strange, 596 (liability for shooting a bystander); Weaver v. Ward (1620), Hobart, 134 (soldier liable for shooting his comrade); Cole v. Fisher (1814), 11 Mass. 241: cases; 1 Thomp. Neg. 242-248: cases; Dixon; *Sic utere tuo*, etc. One aimed at should protest or escape, if possible, or he is guilty of con-

Morgan v. Cox.—

tributory negligence. Bahel, 112 Mich. 24, 36 L. R. A. 523.

MORIER v. E. E.: Sub M'Manus.

MORLEY v. ATTENBOROUGH: L. C. 377.

MORLEY v. REYNOLDS (1844), 2 Hare, 570; Mews' E. C. L. Cited, § 34, Hughes, Conts.

MORTGAGE: "Once a mortgage always a mortgage." Howard v. Harris; Glass v. Hieronymus (1899), 125 Ala. 140, 28 So. 71, 82 Am. St. 225 (deed absolute may be shown to be a mortgage); Cassem, 201 Ill. 208, 74 Am. St. 160; Harrigan, sub MAGNA CHARTA; *Contemporanea expositio*, etc.; *Chase's Case* (1826), 1 Bland, Ch. (Md.) 206, 17 Am. Dec. 227-306, ext. n.; Weathersly, 40 Miss. 462, 90 Am. Dec. 344, 2 Sto. Eq. 1018, 1020, 2 Wash. R. P. 61, 62, 3 Pom. Eq. 1193; *Thorndorough v. Baker*; Casborn, 2 Lead. Eq. Cas. 1183; *Campbell v. Dearborn* (1872), 109 Mass. 130, 12 Am. Rep. 671, 1 Perry, Trusts, 226, n., 2 Wash. R. P. 42, 3 Kent, 142, 2 Bro. & Had. Com. 301, n. 287 Wood. Lim. 236; Dryden v. Hanway (1869), 31 Md. 254, 104 Am. Dec. 61, n.

Change of form of indebtedness is permissible. Dumell, 25 Ind. 397, 85 Am. Dec. 466, 471, ext. n.

Mortgage cannot be made irredeemable. Howard v. Harris; 1 Beach, Eq. 400.

Is a badge of fraud as to existing creditors. Bigelow, 25 Vt. 273, 60 Am. Dec. 264.

A mortgage is generally regarded as a mere incident of the debt. See Jones, Mort. 17, 59, 3 Pom. Eq. 1189, 2 Lead. Eq. Cas. 2006. *Accessorium*, etc.

Future advances; mortgage may be given for. Googins, 47 Me. 9, 74 Am. Dec. 472, 1 Jones, Mort. 364-379, 4 Kent, 175, 176, n., 3 Pom. Eq. 1187-1190, Bump, Fraud. Conv. 229, 1 Lead. Eq. Cas. 837-880; *Ladue v. Detroit*, etc. R. R. (1865), 13 Mich. 380, 87 Am. Dec. 759-773, ext. n.

Mortgagee's rights against third persons. Greer, 70 Kans. 310, 109 Am. St. 424-454, ext. n.

Equity of redemption; nature of. Casborn, W. & T. Eq. Cas., Adams, Eq. 112, 1 Beach, Eq. 468-488, Sto., Pom., Bisph.

Intention controls. Kemble: 391; 13 L. R. A. 294, n.

Mortgage; conditional sale; distinctions. 2 Lead. Cas., 1198, 1199, 3 Pom. Eq. 1179-1228: cases. See Jones, Mort.; Twyne's Case.

Priority of. Keech v. Hall; Moss.

Assumption of by a vendor. Hendrick: 319. See SUBROGATION.

Absolute deed may be shown to be a mortgage; proofs, burden of. 1 Sto. Eq. 440d. See ORAL EVIDENCE.

Generally: 2 Bouv. Dic. 440-448; And. Dic.: 1 Beach, Eq. 394-420, 18 Rul. Cas. 1-576; 3 Dev. Deeds, 1100-1147a; 27 Cyc. 916-1867.

MOSEB v. WHITE: L. C. 125.

MOSS v. GALLIMORE: (1779), 1 Doug. 279-283, 1 Sm. L. C. 967-981, ext. n., 1 id. 689-702 (side pp. 310-317), 5th ed., 1 id. 843-857, 6th ed., 1 id. 843-857, 7th ed., 2 id. 883-895, 9th ed., 514-544, 11th ed. (reviews English cases); 18 Rul. Cas. 404, Laws L. C. Shir. L. C. 5 Mews' E. C. L. 978, 1021, 3 Jac. Fish. 4133-4175, Bro. Max. 359, 1 Ohit. Conts. 515, 2 Sto. 1017; 3 Add. 1027; 2 Wash. R. P. 137, 4 Kent, 156, 165. §§ 219, 326, 330, Hughes' Proc.

Moss v. Gallimore.—

Mortgages; attornment. A lessee under a lease given prior to a mortgage must attorn to the mortgagee after notice. Doctrines of attornment. Keech v. Hall; Eiseby v. Spooner (1888), 23 Neb. 470, 8 Am. St. 128.

MOSTYN v. FARRIGAS: L. C. 274.

MOTIONS: 28 Cyc. 1-20. Dilatory pleadings are strictly judged. See Kraner: 299. Practice relating to. P. v. McCumber: 110. See ABATEMENT. Repetition of motion not permissible without leave. See *Res adjudicata*. Motions and demurrers; respective functions. See DEMURRER. Must be specific and define the fault precisely. Kraner: 299; Bliss, Pl. 420, 424. See ABATEMENT.

Motion defined. Bliss, Pl. 420.

Motions for new trial. See NEW TRIAL. Which are foundation for assignment of error. See *Id.*

To strike, and for judgments on the pleadings, often operate as a general demurrer. One whose pleading gives him no standing is subject to constant attacks. Bliss, Pl. 442. Rushton: 5. See DEMURRER.

Motion for judgment on the pleadings can only be allowed when all material issues are admitted—in effect, when the record is substantially an agreed case. Gartley, 24 Colo. 155; Mills, 24 Colo. 505, 65 Am. St. 241.

Motions in arrest of judgment. Hitchcock: 12. Are waived if not presented in the statutory record in Missouri. 199 Mo. 159.

For new trials. See NEW TRIALS.

Function of motions. Kraner: 299; Bliss, Pl. 420, 425a; P. v. McCumber: 110. See DEMURRER.

Should be passed upon by judge who tried cause and not by his successor. De minimis, etc.; Harrigan, sub MAGNA CHARTA.

MOTIVE: Distinguished from intent. McClain, C. L. 120, *Actus non facit reum*, etc. See INTENT; Chand on Consent; 21 Cyc. 914.

Is no real consideration for a promise. §§ 77, 78, Hughes, Conts. Its effect when the object of contract is illegal. Ans. Cont. 191, 192.

For doing what one has the right to do. See Mahan; South Dakota, 192 U. S. 288, 311: cases; MALICIOUS ACTS; Edwards; Dering; Lancaster, 70 Ohio, 156, 65 L. R. A. 856 (defamation).

Driving stock on unfenced lands of another to depasture them is actionable because of the motive. Cogswell, 10 Wyo. 190, 98 Am. St. 977.

MOTOR VEHICLE: 28 Cyc. 21-54.

MOYNAHAN v. P. (1877), 3 Colo. 367.

Fitzpatrick was killed by M. In describing the crime the name of the slain was used eight times. In two instances it was spelled with a capital or upper case "P," instead of a lower. In other words "Fitz Patrick" instead of "Fitzpatrick." Held, a fatal variance.

"Michael J." is not like "Mike J." Sullivan v. P. (1889), 6 Colo. Ap. 458; *Sault v. P.* (1893), 3 Colo. Ap. 502. *Contra*: Pitsnogle v. C.

The Colorado cases offend the reason of *Idem sonans*, i. e., if the sound is substantially the same, that is sufficient, which was held in *Marr v. Wetzel* (1876), 3 Colo. 2; Pitsnogle v. C.; Robinson: 16.

Moynahan is an extreme case, holding for certainty only as that court does in

Moynahan v. P.—

some cases. Robinson: 16. In other cases it is held that the pleadings can be waived. Hume; Quimby v. Boyd. Or departed from. Perrse v. Gaffney. However, *arguendo*, the court held that an indictment must be certain for *res adjudicata* purposes. 1 Gr. Ev. 63; 2 *id.* 7; 3 *id.* 10. But all of this was afterwards abandoned. Breeze; Rensenger. In later cases troublesome records did not receive the attention given in *Moynahan*, and are disposed of by general statements about like this: "The repugnancies, departures and variances in this case are inimical to the due administration of justice and such incongruities and erraticisms cannot be respected by this court."

For inferior courts, the court took an entirely opposite view, and held that jurisdictional facts might be omitted. Liss, *sub Kempe's Lessee*: 115. After many denials of the rule in *Galpin v. Page*, it was reasserted in *Brown, Ex rel.*, 23 Colo. 425, 431.

One is entitled to a certain record for *Res Adjudicata* purposes. *Moynahan*, 3 Colo. 373. 1 Gr. Ev. 63. See 2 Colo. 88; Hume.

✓ *Repugnancy is fatal to a pleading.* Dovaston: 217. Or ambiguity. Moore v. C.: 21; Walker v. Turner: 118.

Duplicity is to be avoided. Kewaunee: 29. See **DUPPLICITY**.

The mandatory record is scrutinized with surpassing strictness in some cases. Russell v. Shurtleff. Cf. Rensberger; Breeze; Mullegan, 32 Colo. 404. See **VARIANCE**.

MUELLER v. NORTHWESTERN UNIVERSITY (1902), 195 Ill. 236, 63 N. E. 110, 88 Am. St. 194.

Assignability of contracts; may be stipulated against. See **ASSIGNMENT**; 3 Page Conts. 259. *Expressio unius, etc.*, applied.

Practical construction controls where contract is ambiguous. Maher v. S.: 255.

MUGLER v. KANSAS (1887), 123 U. S. 623-678, 31 L. ed. 208, 10 Crim. Law Mag. 253-274, 1 Thayer, Const. Cas. 732, Bish. Torts, Dill., Beach, Pub. Corp., Cool. Const. Lim., 1 Bish. C. L. 450-480 (prohibitory liquor laws); Suth. Stat. 1019; Deems, 80 Md. 164, 45 Am. St. 337, 36 L. R. A. 541 (right to seize and destroy milk); Miller v. Horton (power to condemn and destroy property); Bartemeyer; Fisher v. McGirr.

MULTIFARIOUSNESS: Lebeck, 115 Ala. 447, 67 Am. St. 51, n.; 2 Bouv. Dic., Bliss, Pl. 123.

MULTIPLICITY OF SUITS: Disfavored. Brugger: 162; 2 Bouv. Dic. 452; Whitehouse v. Fellowes. *Res adjudicata*. Hahl. All parties in interest must join. Williams. Citizens of same state may claim property seized by a U. S. Marshal. Buck v. Colbath.

Multiplicity of causes of action. See **JOINDER OF CAUSES**. Must be avoided. *Interest reipublicæ, etc.*; Perez: 2e.

All incidents in a suit should be settled in it on principle; for this view tends to avoid circuity of action. Accordingly, damages on attachment and injunction bonds should be assessed in the same case. *Sub Trapnall v. McAfee*. See **RECONVENTION**; **RECOUPMENT**; **SET-OFF**; **CONVENIENCE**: § 53, Gr. & Rud. Whatever

Multiplicity of Suits.—

avoids expense and delay, and advances expedition, simplification and unification should be favored. Such is the trend of progress and the genius of codes.

MULTI UTILIUS EST PAUCA IDONEA effundere quam multis inutilibus homines gravari: It is much more useful to pour forth a few useful things than to oppress men with many useless things. 4 Coke, 20.

MUNDAY v. VAIL: L. C. 79.

MUNICIPAL BONDS: Depend on the exercise of public agencies whose acts must appear of record. Provident Co.; Stanley Co., 121 N. C. 394, 39 L. R. A. 439; cases, 178 U. S. 565, cited in 180 U. S. Notice of powers of public agent must be taken. Clark v. Des Moines.

MUNICIPAL CORPORATIONS: 28 Cyc. 55-1781. Contracts of. See Hill v. Boston: cases; 2 Beach, Conts. 1133-1210; Dill. Corp.; Beach, Corp.; *Ultra vires*; McClain, C. L.

Rights and duties of. Hill v. Boston: cases. *Nuisance*; power to declare and to abate. Evansville; Foote (1901), 70 Ark. 12, 91 Am. St. 63, n. (keeping a jackass is). *Abuse of power may be restrained.* Inge, 135 Ala. 187, 93 Am. St. 20.

Power to borrow money. 2 Page, Conts. 1018.

MUNN v. ILLINOIS (1876), 94 U. S. 113, 24 L. ed. 77, Myer, Vested Rights, 176, 1 Thayer, Const. Cas. 443, McClain, Const. Cas. 946, Laws. Lead. Cas. Const. Law, 282. Cited, Cool. Const. Lim., Ror. Int. Law, Gr. Pub. Pol., Dill. Corp., Beach, Corp., Tiede. Pol. Power; Eddy, Combinations.

Private property devoted to public use is subject to public control. *Sic utere tuo, etc.* See **MONOPOLY**; Rates, 2 Bouv. Dic. 823, 824; 35 Wis. 572 (states may regulate).

Evolution and diminution of. Munn. San Diego Water Co., 118 Cal. 556, 62 Am. St. 261-304, ext. n.: cases.

Power of municipal corporations to regulate the price of gas. Muncie Co., 160 Ind. 97, 60 L. R. A. 822.

MUNNS v. DUPONT: See **MALICIOUS PROSECUTION**. Cited, § 103, Hughes' Proc.

MURDER: McClain, C. L. 317-334; Am. Cr. Rep.; 2 Bouv. Dic. 459-460; U. S. v. Holmes: cases. See **HOMICIDE**; **SELF-DEFENSE**.

Assault to commit. McClain, C. L. 273-279.

MURRAY v. HOBOKEN CO.: L. C. 219.

MUSSETT v. BINGLE (1876), Reported in Weekly Notes, 170; Ames Cas. Trusts 201.

Trusts—perpetuity. Direction in a will giving \$1,300 to erect a monument, also \$1,200 for keeping it up was sustained as to the first and defeated as to the latter, as this was a perpetuity. See Jones v. Habersham, 107 U. S. 174, 3 Woods C. C. 470 (statute involved).

MUTUALITY: Essential for a contract. Cooke: 321. Change of contract cannot be made by one party only. Wuerfler, 116 Wis. 19, 96 Am. St. 940, n.

Both sides must be bound or neither. Cooke: 321; Bish. Conts. 78; Fowler, 168 Ind. 1, 7 L. R. A. (N. S.) 726.

MUTUALITY IS EQUITY: Application of, in procedure. Both parties must respect the forms of the law. S. v. Baughman: 268. Both must act *bona fide*. Graver: 103. Both are bound, or neither. Cook: 321: cases.

MUTUAL LIFE INSURANCE CO. v. Dingley (1900), 100 Fed. 408, 49 L. R. A. 132.

Verba generalia restringuntur, etc. A general denial by an insurer that the husband has performed all or any of the conditions of his contract, when coupled with a specific averment of particulars in which he has failed to perform, will not permit proof of failure in other particulars. 40 U. S. App. 382, 77 Fed. 138, 143, 23 C. C. A. 89, Kahnweiler, 32 U. S. App. 230, 67 Fed. 483, 485, 14 C. C. A. 485; Preston, 12 Bush., 570, 582 (pleading conditions precedent under code; denials must be specific, or they are void).

Pleading performance of conditions precedent under the code, followed by a specification and enumeration of grounds of failure; these exclude all others. Expressio unius. And if these are insufficient then the whole plea is ineffectual. 39 L. R. A. 136; cases, *supra*. General denials construed by particular. Dickinson: 34.

MUTUAL PROMISES: Are a consideration. Ans. Conts. 72, 78; Cooke: 321. Performance of one does not discharge the contract. Ans. Conts. 271.

Subscriptions are. Ans. Conts. 72, note; Wightman (breach of promise). Mutuality essential for a contract. §§ 27, 35, 42a, 48, 51, Hughes, Conts.; Smith, 153-156, Whart., § 2. The concurrence of a promisor and promisee as to the same thing is essential. Smith, Conts. 154. Livesley, 45 Or. 30, 65 L. R. A. 783, n.

Mistake may destroy mutuality. E. g., if one married a wrong person by mistake. Fraud will destroy, and be a ground of rescission. Whart. Conts. 232a; Whitworth.

MYERS v. ERWIN: L. C. 150.

NAMES: One may adopt any name he pleases. Moore v. C.: 21; Bro. Max. 196, n.; Brown: 346; R. v. Martin; 29 Cyc. 261-278.

Constructive notice depends on certain name. Burns, 215 Pa. 293, 64 At. 526, 7 L. R. A. (N. S.) 415, n. (Frank is Francis).

Of parties essential. Wiebold: 98. See **PARTIES:** *Idem sonans*; Marx; 1 Freem. Judg. 50b; *Non differunt*, etc.; *Veritas demonstrationis*, etc.; *Scientia*, etc.; *Si quidem in nomine*, etc. Essential in notice for mechanic's lien. Madera Flume, 120 Cal. 182, 65 Am. St. 177. Middle initial no part of a name. Beattie, 174 Ill. 571, 66 Am. St. 318, n., 43 L. R. A. 654, n., Bliss, Pl. 146a; 7 Am. Cr. R. 244.

Codes requiring names in pleadings. Bliss, Pl. 145-147. Proceedings omitting them would be absurd. Where name is unknown; form of allegations. Bliss, Pl. 147. Terminology. *Ignoratis terminis*, etc. See Kansas Nat'l Bank, 62 Kan. 692, 84 Am. St. 417, n. (when unauthorized signer of a note for another is not liable thereon).

A deed under an assumed name is binding. Hartman v. Thompson, 104 Md. 389, 118 Am. St. 422, n.

Generally: 2 Bouv. Dic. 463, 464; see **Nomen**, 2 Bouv. 504; And. Dic.; *Nihil facit error nominis*, etc.; **CHRISTIANITY**.

NASHVILLE TRUST CO. v. Smythe (1895), 94 Tenn. 513, 45 Am. St. 748: cases.

Transfer of a debt carries the security. Bateville, 18 Wall. 151, 21 L. ed. 775, n. Assignment of one note carries the security. Mechanics' Bank, 9 Wend. 410; Nashville, *supra*, and rules stated in 2 L. R. A. 663; Parker, 6 How. 320, 38 Am. Dec. 438-441, n. (each holder rates); 3 Pom. Eq. 1203. See Horn, 153 Ind. 150, 24 L. R. A. 800-805, n. And

Nashville Trust Co. v. Smythe.—

the security will be apportioned according to equity. Penzel, 51 Ark. 105, 14 Am. St. 23; *Accessorium*, etc.

NATIONAL BANK v. GRAND LODGE, 98 U. S. 123. See Hendrick: 319.

NATURE FIDE JUSSIONIS SIT STRICTISSIMI JURIS ET NON DURAT, VEL EXTENDATUR DE RE AD REM, DE PERSONA AD PERSONAM, DE TEMPORE AD TEMPUS: The nature of the contract of suretyship is *strictissimi juris*, and cannot endure nor be extended from thing to thing, from person to person or from time to time. See **SURETIES**; Rees: 334a; Abel: 334.

NATURA NON FACIT VACUUM, NEC *lex supervacuum:* Nature makes no vacuum, the law nothing purposeless. Coke, Litt. 79. Vain things not allowed. *Lex neminem cogit*, etc. *Supervacuum*, etc.

NEAGLE'S CASE: L. C. 248.

NECESSARIES: *Contracts for.* Peters v. Fleming; Hughes, Conts. 60; Whart. Conts. 121; Ans. Conts. 105-112; Bouv. Dic. 476; And.; 29 Cyc. 376-377.

For insane. Molton: 413. Liability for is a quasi contract. Sub Boston: 320; Craig. See **INFANTS**; **MARRIED WOMEN**; **INSANE**.

Those unconscious or dying might require necessities, and their condition would be equal to the necessary request and promise.

NECESSITAS INDUCIT PRIVILEGIUM *quoad jura privata:* With respect to private rights, necessity privileges a person acting under its influence, or, in the domain of *Jus privatum* necessity imports a privilege. Bacon, Reg. 5; Bro. Max. 11-19. §§ 13, 216, 352, Hughes' Proc.

LEADING CASES: U. S. v. *Amistad*, (The *Cinque's Case*, or *The Amistad Case* (one may kill to regain his freedom when unlawfully captured); U. S. v. *Holmes* (contracts limit the right of self-defense); C. v. *Neal* (the doctrine of coercion); R. v. *Dudley*; *The Mignonette Case* (principles of self-defense); *Campbell v. Race* (the law will suffer a mischief rather than an inconvenience); *American Print Works v. Lawrence* (right to destroy private property to arrest a conflagration).

Illud quod alius licitum non est, necessitas facit licitum, et necessitas inducit privilegium quod jure privatur: That which is not otherwise lawful necessity makes lawful, and necessity makes a privilege which supersedes the law. 10 Coke, 61; *Necessitas inducit*, etc.

NECESSITY: When an excuse for commission of a crime. R. v. *Dudley*; R. v. *Tyler*; 12 Cyc. 160.

Agency by necessity. Ans. Conts. 355, 367. *What originates with necessity ends with it, like a way.* Sub *Finnington*; *Campbell v. Race*.

Necessity creates equity and influences procedure. *Necessitas*, etc.; *Juridictio*, etc. Process can be served on Sunday, if necessity demands. Hauswirth: 51; Langabier: 174a. See 2 Bouv. Dic.; 29 Cyc. 379.

Necessity is the fourth ground and rudiment of law. §§ 8, 28, 46, 47, 50, 51, 60-62, 163, 293, G. & Rud.

The grounds and rudiments of law and the conserving principles of procedure are necessities for the integrity and usefulness of jurisprudence. See **PRESCRIPTIVE CONSTITUTION**; **CONSTRUCTION**; **CODES**.

Necessity.—

Three great maxims introduced. Great judges and writers fully recognize the incalculable influence of three great maxims upon the law, namely, *Salus populi suprema lex*, *Necessitas inducit privilegium*, etc., and *Summa ratio est quæ pro religione facit*. As rules of public policy, they are presented in this order in Broom's Maxims. They are paramount; they are above all. The rules of public policy, of necessity and of morals profoundly pervade procedure, as a reference to maxims will show. They should be connectedly considered, and also in relation to the conserving principles of procedure, wherewith they are intimately interwoven. For reasons of public policy, for the necessity of a constitutionalism, a court is bound by its record; from necessity there must be records to support the conserving principles of procedure, and to limit issues and narrow proofs, to exclude irrelevant evidence and afford the mainstay of that maxim of certainty and of morals, *viz.*: *Expressio unius*, etc. Along this line of suggestion, infinite views might be presented, and these long dwelt upon. See MANDATORY RECORD; APPELLATE PROCEDURE.

The division of state power is a dominating principle in a constitutionalism, still from necessity a court may enact and promulgate rules of practice; it may also exercise administrative functions by providing for a court room, etc. *S. v. Townley*: 225a.

The right of trial by jury is another fundamental principle. *Ad questionem*, etc.; 195 U. S. 154. Nevertheless a court may prefer charges of contempt, and prosecute them, and also sit and try such charges as judge and jury. Debs; *S. v. Townley*: 225a; *Verba intentione*, etc. A term of court may be extended *ex necessitate* to dispose of a case pending, notwithstanding the very strict rule relating to terms of court. *Sutherland v. S.* (1897), 150 Ind. 154-157.

The foregoing instances also illustrate how fundamental rules of protection act and react upon one another. *Texas R. R. v. Humble*. Also the rule relating to negative facts, as to who must allege and prove them from necessity. 1 Ell. Ev. 141; *Bonnell*: 185.

Compulsion for committing crime is no defense, e. g., starving, ship-

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wrecked sailors are guilty of murder for killing a boy, one of their number, for food, although lots were cast and by this means he was fairly selected. *R. v. Dudley* (the Mignonette Case) (1884). Personal danger is no excuse for one making murderous assaults on third persons. Bro. Max. 18. One has no right to commit lawlessness from apprehension of personal injury, however imminent and menacing. *R. v. Tyler*; 2 Bish. Crim. Proc. 3. But where a mob compelled a trespass by forcing one to strike and break machines, this was held a defense.

R. v. Crutchley (1831), 5 C. & P. 133 (24 E. C. L. R.), 3 Crim. Def. 639, n., Clark, Crim. Cas. 139, 19 L. R. A. 358. *A twelve-year-old boy, if coerced, is not an accomplice.* Beal v. S. (1884), 72 Ga. 200; *P. v. Miller* (1885), 65 Cal. 468, 19 L. R. A. 358.

Duress is sometimes an excuse for crime. *Arp v. S.* (1892), 97 Ala. 5, 38 Am. St. 137, n., 10 L. R. A. 357-362, n., 3 Gr. Ev. S. 138, 1 Bish. C. L. 346-366; *S. v. Nargashian*, 26 R. I. 299, 106 Am. St. 715-723, ext. n., quoting Stratton's Case, 21 St. Fri. 1048-1222 (Mansfield); 4 Bl. Com. 30; *Crutchley, Tyler and Dudley cases*.

Duress as an excuse for making a contract was formerly viewed with even harshness. But in the last century it has met with increasing favor, commencing with *Sasportas*.

Williams v. Bayley, sub Sasportas, 2 Gr. Ev. 301, Bish. Torts, 245. Bish. Confs. 724, Ans. Confs. 164, 2 Wh. Ev. 931; *City Nat'l Bk. v. Kusworm* (compounding offenses); *Guetskow*, 96 Wis. 591, 65 Am. St. 83, n. (liberal rule applies; compulsion not necessary).

No actionable wrong—deliction—can justly arise from what one is compelled to do in obedience to law; and to illustrate: Damage caused from obedience to a lawful command is not actionable, as where a pilot is on board under compulsion of law, the ship owner, upon general principle and irrespective of any express statutory exoneration, is not liable for damages caused by the fault of the pilot.

The Maria (1839), 1 Wm. Robinson, 95-111, 21 Rul. Cas.; *Atty. Gen. v. Sese*, 3 Price, 302, 17 R. R. 566. *Fundamental legal provisions are interpreted into statutes.* *The Maria, supra*; *Suth. Stat.* 289, 290; *Heydon's Case*; *Trist*: 214, et seq.; *Church*; *Galbraith*.

Compulsion as an excuse for ex delicto wrongs. The law in trespass and in other relations is that one is liable for the natural, direct and probable consequences of his act. *Scott v. Shepherd*; *Squib Case*. But the act must be voluntary (*Actus me invito*, etc.), not an accident. *Actus Dei neminem facit injuriam*. If the

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act was involuntary, generally no liability attaches, even in trespass, *e. g.*, the intermediate throwers of the squib (*Scott v. Shepherd*) were not liable. In *Vosburgh* several persons went out to play ball near the highway, and the ball was so thrown by one of the players as to injure a passenger on the highway, and here all were held liable. But intent is no element in trespass, while it is the very essence of a crime. *Actus non facit reum nisi mens sit rea*. But in *Vanderburgh*, a man with a pick was chasing a boy, who, in his fright, while trying to escape, upset a cask of wine, and properly the man was held liable. Simply the doctrine of the "*Squib Case*" was applied. *In jure non remota*.

Commission of crime under compulsion has always called forth more or less compassion, and juries reluctantly convict and frequently make recommendations to executive clemency; but still the law is clear that the plea or claim of compulsion is not a full and perfect defense for criminal acts, and certainly never for trespass, for infants (*Gilson v. Spear*), idiots, the insane (*Krom v. Schoonmaker*), and all persons are liable for their torts, unless their commission was shown to be an accident, or an excuse is shown resting on the immunities mentioned, which include many trespasses, as we have seen.

Self-defense, execution of process, and necessity resulting from the act of God or of a stranger are three principal defenses that arise from *Necessitas inducit*, etc., and so we see it is a maxim that is applicable to procedure, as will be next illustrated in reference to the matters last mentioned, and:

1. *Self-defense*. *U. S. v. Holmes*; *R. v. Dudley*.

The rationale of self-defense rests upon the law of necessity, and is derived from the law of nature. Bro. Max. 11. It is not derived from society but from nature, and it cannot be taken away or superseded by society. *U. S. v. Outerbridge*; 1 Bish. C. L. 200; 1 Bl. Com. 131; 3 *id.* 3; McClain, C. L. 136-144.

And one may destroy innocent third persons to save his own life. *U. S. v. Holmes, e. g.*, the stronger, to save himself from drowning, may push the weaker off the plank; Bro. Max.

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11; and further, one may shield himself from a bursting bomb with the body of his fellow man. *Laidlaw v. Sage*. In *U. S. v. Holmes*, sailors from a wrecked ship clubbed its passengers from the overcrowded life boats to save themselves; they were held guilty of manslaughter. But it is to be noted that the common carrier owes the passengers a duty (*Craker*; *Coggs*; *Scott v. Shepherd*; *Pacto aliquid*, etc.), and that the sailors could not, even in a great emergency, refuse this duty. It was their duty to protect, not to assault and to destroy. *U. S. v. Holmes* should be carefully compared with *R. v. Dudley*. And where one is suddenly put to an election, and he acts from great perturbation of judgment and reason, as, in presumption of law, man's nature cannot overcome, such necessity carries a privilege in itself, *e. g.*, in the *Squib Case*, the intermediate throwers acted involuntarily, and at least from fear and without deliberation, for they acted to save their goods; and, as we shall see, one may protect his property. *Aldrich v. Wright*; *Gibney v. S.* (or his child). To protect levees hogs may be killed. *Ross*, 83 Ark. 176, 119 Am. St. 131-136. SEE POLICE POWER.

One is not liable for what he did not contemplate or intend. *C. v. Moore*.

One may defend his fellowman as he may himself, or members of his family. Bro. Max. 11, 13; *Stanley v. C.* (1887), 86 Ky. 440, 9 Am. St. 306; *Beard v. U. S.* (1895), 158 U. S. 550. A passenger may lighten a boat by throwing overboard goods in transit to save himself and other passengers from drowning; and we have seen that property may be destroyed to arrest a fire. *American Print Works*. One may kill a violent felonious malefactor, exactly as an officer might, to prevent the commission of a felony. Every citizen is clothed with power to stop brawls, breaches of the peace and to arrest felons; and every agency carries with it implied powers to effectuate the end in view, exactly as in all other cases of agency. *Expressio eorum quæ tacite insunt nihil operatur* (Things implied need not be mentioned.) *M'Culloch*: 147; *The Maria, supra*. Every citizen is a defender of the public laws.

Allen: 161: cases; *Dill v. S.* (1854), 25 Ala. 15, *Hor. & Thomp. Cas. Self Def.*

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744 (1 Crim. Def.), 1 Bish. C. L. 843, 877, Cool. Torts, 167, 3 Bl. Com. 2, n.; Wells, Jur. 308; Whart. Hom. 480-559; 1 Kent, 48; §§ 427, 428, Hughes' Proc.

The law of self-defense is, that a remedy may be had where official aid is impracticable, and it is not larger for one's self than for all. It is for the protection of absolute rights of life, liberty and property.

Cinque's Case; Crawford v. S. (1893), 90 Ga. 701, 35 Am. St. 242, n., stated, 37 Cent. L. J. 44.

Defense of wife's chastity. The defense of the chastity of a female under one's protection is governed by rather liberal rules. About this the written and the jury law are not in accord, and in this way juries refuse to convict where one is slain for attacks upon a wife's chastity.

Biggs v. S. (1860), 29 Ga. 728, Hor. & Thomp. Cas. Self Def. (1 Crim. Def.), 744-757; Whart. Hom. 407; 1 Bish. C. L. 866; 2 *id.* 408; Cool. Torts, 167; S. v. John (1848), 8 Ired. Law, 330, 49 Am. Dec. 396, n.; Kerr, Hom. 194. See Willkenson v. S., 91 Ga. 729, 44 Am. St. 63, n.; Price v. S. (1885), 18 Tex. Ct. App. 472, 51 Am. Rep. 322, n.

And still the law is, that the procedure involved begins and ends with necessity. The actor is viewed like the judge of an inferior tribunal; he must look and judge of the necessity, and the facts must warrant his conclusions—his action. §§ 133, 134, Hughes' Proc.; Miller v. Horton. One must not mistake the law; he has no right to kill a mere trespasser; such defense is excessive and is not justifiable. One cannot defend his premises against mere trespassers with man-traps and dangerous instruments; Bird v. Holbrook; Hooker v. Miller. The defense of the castle gives enlarged rights. Semayne's Case, 1 Bish. C. L. 367.

Resisting unlawful arrest. *Noles v. S.* A posse, without a warrant, went to Nole's house to arrest him for a misdemeanor. Noles warned them away; but the constable dismounted, and Noles killed him. *Held*, he was guilty of murder. One may not kill to resist a mere trespass.

Noles v. S.; Hor. & Thomp. Cas. Self Def. (1 Crim. Def.), 679; Kerr, Hom. g. v.; Bish. Crim. Proc. 162, 188; Miers v. S. (1895), 34 Tex. Crim. Rep. 161, 53 Am. St. 705, n.

Resistance must not be excessive. *S. v. Benham* (1867), 23 *id.* 154, Hor. & Thomp. Cas. Self Def. (1 Crim. Def.), 126, 92 Am. Dec. 417-422; cited, Bish. C. L. Rights from necessity end with it.

Right to kill in order to arrest. *S. v. Roane.* Roane was suddenly awakened at night, and seizing a gun, he

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opened a window and saw a man retreating. R. asked, "Who is there?" and receiving no answer, he then shot and killed a negro. His defense was that he slew to prevent the commission of a felony, but he failed to prove that a felony was committed, and to inform the deceased first that it was only to arrest that he called out. R. was convicted. See *S. v. Roane*.

Resisting officers; right to resist unlawful usurpation is justified. *S. v. Davis* (1898), 53 S. C. 150; 69 Am. St. 845. An officer must have a warrant, when one is required.

R. v. Cumpton (1880), 5 Q. B. Div. 341; *U. S. v. Sears* (1878), 3 Wood. 510, 4 Crim. Def. 354, n.; *Bryant v. S.* (1883), 16 Neb. 617, 6 Crim. Law Mag. 342-348 (Sunday service of process, when illegal, may be resisted); 2 Bish. Crim. Proc. 879-898 (resisting an officer).

Retreating to the wall. One must retreat to the wall, if necessary to avoid killing. *Bro. Max. 12.* And one must not seek or provoke a combat and then kill. From such facts a perfect defense cannot arise. 1 Bish. C. L. 869, 2 *id.* 702. And one must stand an ordinary assault and battery—a mere trespass or stroke—without killing.

O. v. Selfridge, 1 Bish. C. L. 836-877; *Rowe v. U. S.* (1896), 164 U. S. 546; *S. v. Hatch* (1896), 57 Kan. 420, 57 Am. St. 327, n. (one need not apply for official protection before killing).

One in his dwelling need not retreat. *Binkley v. S.* (1888), 89 Ala. 34; 16 Am. St. 87, n.; *Allen v. S.* (1896), 164 U. S. 492.

One cannot make a perfect defense, where he has provoked an altercation, by retreating and then slaying. *Stoffer v. S.* (1864), 15 Ohio St. 47, 86 Am. Dec. 470, 1 Bish. C. L. *Nullus commodum capere:* No man shall take advantage of his own wrong.

Threats as an element in defense cases. *P. v. Campbell* (1881), 59 Cal. 243; *Wilson v. S.* (1892), 30 Fla. 234; *Campbell v. P.* (1854), 16 Ill. 17; *P. v. Vernon* (*Res gestæ*).

Right to defend property is also conceded. It is an absolute right, and as such may be defended.

Aldrich v. Wright; *P. v. Kane* (1892), 131 N. Y. 111, 27 Am. St. 574, n.; *Alberty v. U. S.* (1895), 162 U. S. 499, 40 L. ed. 1051, n.

One cannot steal clothes or food to relieve pressing necessities. *Bro. Max. 19.*

2. **Obedience; plea of process; justification.** *Savacool:* 164. **Coercion of wife.** *C. v. Neal*; *R. v. Torpey*.

Protection from official abuse and usurpation was provided for in Magna Charta, and for this very strict rules

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govern executive officers, for if they abuse an authority given by law, they are trespassers *ab initio*. Six Carpenters' Case: 165. And on the other hand, if only the officer is executing *regular process* he has absolute immunity, generally. But it is held that he must also act *bona fide*. Grace v. Mitchell; Bro. Max. 13. Here we cannot argue why all official action should be *bona fide*, why fraud should vitiate all acts. It seems that the rule is that, if the process is regular, the officer is protected to infinity, and if not, he is liable as trespasser *ab initio*, and even if he fails to return his process. For his defense a record is required. What ought to be of record must be proved by record and by the right record. He must plead and produce a record; the best evidence is required, and if he fails to do his duty about this indispensable record, *Volenti non fit injuria* applies to him. Tubbs v. Tukey, *sub* Six Carpenters' Case: 165; Wiggins v. Atkins, *sub* Six Carpenters' Case.

Regular process is the officers' protection. Savacool: 164. And the weight of authority holds that for execution he has absolute immunity. Savacool: 164. That he is bound to accept his office, like all other officers, and promptly to execute all regular writs directed to him. Bro. Max. 13; *Qui jussu judicis*, etc.

And when the private person may arrest, or make self-defense for himself or for others, as elsewhere mentioned, he may plead the facts as a defense. Of course the officer must plead and prove a record and writ, where the law requires such. We repeat, the best evidence is required.

A *plea of justification must be certain.* J'Anson: 91. The facts must be pleaded, and the rule is general and applies here, that defenses not pleaded are waived. One cannot waive a defense and then insist upon it. Field: 84. If the facts should be of record, then enough of the record should be set forth, and at least the process, so the court can judge of its sufficiency—its regularity. An officer cannot act under the judgment alone; process must issue and be delivered to him. Blair: 170. The forms of the law are a part of the law. *See FORMS OF THE LAW.*

Officer cannot tamper with his process to make it regular, and then plead it

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as regular. Leachman v. Dougherty (1878), 81 Ill. 324, Cool. Torts, 545 (officer must act *bona fide*). Irregular process has void or illegal items upon its face. Cool. Tax. 800, 3d ed.; Eames v. Johnson (1862), 4 Allen, 382. Or sham, void proceedings.

Regular process is the officer's defense, and not a purchaser under his proceedings. Wells, Replev. 235; Cool. Tax. 800, 801, 2d. ed. The latter must show a judgment levy and sale, or if the subject-matter is realty, then also a deed; or if a tax, an assessment record or roll, an order levying the tax, a tax warrant and sale; and a deed, if realty. Proceedings before inferior tribunals depend upon jurisdictional facts, and, on principle, these should be pleaded. But beginning in A. D. 1610, legislatures have been attempting to substitute conclusions of law and of fact for the material facts of the case; codes now provide how inferior statutory proceedings may be pleaded by conclusions of law. But these are obnoxious to the "due administration of justice."

The due course of justice demands certainty, and this requires that facts be pleaded. There are limitations of legislative power. The functions of justice should not be obstructed by generalities that will refer a cause to a jury for trial which should have been determined by the record pleaded, if it had only been truly pleaded. Pleadings ought to be true. False pleadings constitute sham and fictitious cases or defenses, if anything; and they are a contempt of court. Protection and morality depend upon a proper application of *Summa ratio est. Mala fide* conduct is always repressed, and of course it should be in procedure, as it is in contracts, the criminal law, torts, equity, agency and other relations. False and sham pleadings are a culpable abuse of one's right to appear and be heard, and they confer no jurisdiction of a *subject-matter*, neither a case nor a defense. For protection, education and morality there is necessity for honest and true and at least *bona fide* pleadings, and necessarily for the exclusion of fraud. *Ex dolo malo non oritur actio*: Max. No. 9, §§ 147-153, Hughes' Proc.

Coercion of the wife presumed in misdemeanor and torts committed by her. C. v. Neal; R. v. Torpey. Obedi-

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ence of the wife is enjoined in the Holy Scriptures, and is generally stipulated for at the altar; and the common-law, consistently with Divine law and the marriage contract, and, we may add, with the devotion and fidelity of the wife—indeed with woman's nature—will only hold her criminally liable for the graver crimes, or for felonies. For the commission of torts and of misdemeanors in the presence of her husband she is *prima facie* presumed to have acted under the husband's command, and therefore he alone is responsible. Unless he rebuts this presumption, he is responsible for her torts and misdemeanors, according to the common law rule that husband and wife are one, and the husband is that one.

Where husbands beat their wives, it is often observed that the wife will sacrifice truth to shield the husband and it is the common experience of those who interfere to protect the wife from the assaults of the husband that she will actively join him in forcibly resisting interference, made solely for her protection and often at her imploration. The presumed coercion of the wife is a good illustration of a human law derived from the Divine law and the law of nature as well, and these are the most solid footings that any law can have; laws thus founded are both wise and moral, and they properly protect and educate. Of course coercion from obedience extends to no other relation than that of husband and wife. *Cessante ratione legis cessat ipsa lex* (The reason of the law ceasing, so does the law itself). And it is proper to observe that the nature of a *subject-matter* must be respected by all intelligent and moral laws, and this is a leading idea in construction.

There is no agency in crime. Agency rests on contract, and one cannot authorize nor can one contract as an agent to commit crime. Poulton. Crime has no *principal* and *agent*, but instead all are accomplices, and as such are equally liable. Indeed it is a general rule that no right can be founded on a felony, and therefore that a forgery cannot be ratified. *Crimen omnia*.

But the coercion of the wife is an exception. For her *Qui per alium facit, facit per se* has its most gracious and singular extension. Neither

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er the child nor the servant can plead coercion, nor duty to obey and their consequent obedience, although the relation of parent and child is close and intimate. It is the duty of the parent to protect, nurture and educate, and of the child to obey. But the laws demand more and stronger fealty from the child than from the wife, for, as we have seen, she alone can successfully plead coercion. This, therefore, is a wife's defense or plea, when necessary to be interposed. And like the *In pari delicto* defense in contracts, a court will *sua sponte* raise the defense in any way that notice of the relation of husband and wife appears. And thus it might arise from the evidence, from *probata* instead of *allegata*; and this, notwithstanding the rule, that defenses not pleaded are waived—gone forever. Generally, what one does not properly set on the record and mention for a defense is waived, and, we repeat, gone forever. *Interest reipublicæ*; Munday: 79; cases; Sache. It is his own fault, negligence, *Volenti non fit injuria*. Defenses must be pleaded and shown from the *record proper*—mandatory record—exactly as a ground of recovery. In no other way can a court lawfully acquire jurisdiction of a *subject-matter*, except by pleading it. Munday: 79; Sache. Pleadings are essential to confer jurisdiction, they cannot be waived. Consent cannot confer jurisdiction, and this applies to all systems.

3. Mental deficiencies referable to necessity.

Act and intent must concur to constitute crime: Actus non facit reum nisi mens sit rea. Children under seven, idiots and lunatics are incapable of committing crime; to them applies the maxim *Furiosus solo furiore punitur* (A madman is only punished by his madness). Intent is an essential element of all crimes, except a statutory crime, which excludes the intention as an element. And consequently the intent must be alleged and proved in all cases where it is an element, and it must, in certain cases, be charged as "wilfully," "feloniously," and with "premeditation and deliberation." These words are descriptive of specific intents, and when they are, and so charge and describe the intent, then it must be proved as laid.

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Sanity is presumed to exist until the contrary is proved. The burden of proving insanity devolves upon a defendant. So we see that this defense must be laid and proved according to a primal rule of evidence, i. e. the burden of proof devolves upon him who holds the affirmative of an issue. *Actore.* Exceptions to the general rule may be found. See *S. v. Marler*: 188; *INSANITY*; *INTENT*; *L. C.* 188-199. Since the specific intent must be averred, then the state must prove it, and beyond a reasonable doubt. But the presumption of sanity stands for the state, and to this also the facts and circumstances of the case, also the presumption that one intended the "natural, direct and probable consequences of his act" (*In jure*; *Squib Case*; *C. v. Moore*), which also applies in all relations. *Scott v. Shepherd*, (*Squib Case*). It pervades contract, tort and crime. *In jure.*

M'Naghten's Case: 195; *sanity a question of fact for the jury.* A jury tries in a criminal case; they pass on the question of sanity, of course. *S. v. Croteau*: 271; *Ad questionem*; *Durant v. P., sub MALICE.*

"It," said the majority of the judges, in answer to the question proposed to them some years since, by the House of Lords, relative to insane criminals, "the accused was conscious that the act was one which he ought not to do, and if that act was, at the same time, contrary to the law of the land, he is punishable; and the usual course, therefore, has been to leave the question to the jury, whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong; and this course we think is correct; accompanied with such observations and explanations as the circumstances of each particular case may require." *M'Naghten's Case*: 195.

Insane delusions; rules; tests. M'Naghten's case.

"The following rules and illustrations mentioned by the learned judges will be found to throw considerable light upon this difficult and interesting subject: 1st. Where an individual labored under an insane delusion, in respect of some particular subject or person, and knew at the time of committing the alleged crime that he was acting contrary to law, he will be punishable according to the nature of the crime committed. 2d. Where such delusion is as to existing facts, and the individual laboring under it is not in other respects insane, he must be considered in the same situation as to responsibility as if the fact with respect to which the delusion existed were real. For instance, if a man, under the influence of his delusion, supposes another to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defense, he would be exempt from punishment; whereas, if his delusion was, that the deceased had inflicted a serious injury

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upon his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment." *M'Naghten's Case*: 195.

Drunkenness as a defense. U. S. v. Drew. Drunkenness aggravates crime; no extenuation is afforded one who is a voluntary demon. *Bro. Max.* 17. But insanity, remotely caused by intemperance, stands on the same footing as excusable insanity and delusions. In *U. S. v. Drew* the insanity was excusable, for there it was *delirium tremens* and the remote effects of drunkenness. The facts were: Drew was master of a ship and was addicted to ardent drink and protracted sprees, which finally induced *delirium tremens*. In his ravings he had all intoxicants thrown overboard, and was restless day and night, being wild and delirious, and while in this condition killed the mate. It was found that he was insane from abstinence from liquor, not intoxicated from its direct use. *Held*, he was not guilty of murder.

Contracts of persons non compos mentis: *Molton*; *Mitchell*; *Baxter*; *Beverly*: *L.C.* 413-416. Generally, before inquisition found, a lunatic may contract for necessities. Medical attendance and necessities furnished an unconscious person raise a promise to pay by implication; this is from necessity.

Limitations of the plea of necessity.

The wife cannot claim or be accorded the defense of coercion for felonies in which she is an accomplice; for these she is liable as if she were sole. One cannot save his own life by killing an innocent person; for he had better die himself than escape by the murder of an innocent man. But if one is making lawful self defense, and inadvertently kills an innocent person, this is excusable homicide.

One must sacrifice his own life for the public welfare. The promotion and maintenance of this demands that one give his own life in his country's service. The Greek comprehended and inculcated this principle. The mother and wife smiled if the son or husband fell, and wept if they survived defeat. *Leonidas at Thermopylæ* furnished the world an illustrious and enduring example of heroic patriotism and sacrifice. The paramount principle of law, of *Salus populi*, etc., is breathed

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in the epitaph said to have marked his resting place:

"Go tell the Spartans, thou that passest by, That in obedience to their laws here we lie."

"The path of duty is the road to glory," should be the epitaph of Demosthenes for the sentiments he expressed in the oration on the crown.

Necessity influences contract law, e. g., the common carrier is made an insurer of goods from necessity to afford protection to shippers; these would be at the mercy of carriers but for the strict rule applicable to them. But for the strict liability of the carrier, he could steal, embezzle, consort with thieves and then defeat the shipper, who would in nearly all cases be bound to accept the excuse of the carrier whatever it might be. Coggs: 350; The Caledonia, 157 U. S. 144. Salus populi suprema lex.

A carrier of freight is an insurer of it, except in case of accident, acts of public enemies and the fault of the consignee. Whitney: 112.

NEEDHAM v. THAYER: L.C. 261.

NE EXEAT REGNO (REPUBLICA):

That he leave not the realm. Gilbert, 1 Hop. Ch. 496, 14 Am. Dec. 557-563; Moore, 151 Mass. 393, 7 L. R. A. 395, n., 2 Kent, 33-35, 2 Beach Eq. 1010, 2 Bouv. Dic., Davidor, 130 Wis. 22, 118 Am. St. 986-997, ext. n.; 29 Cyc. 382-398.

Preservation and prevention of removal of property beyond jurisdiction pending litigation as ground for appointment of a receiver. Clark v. Brown (1902), 57 C. C. A. 79-99, ext. n.

NEGATIVE ALLEGATIONS: who must prove. 1 Ell. Ev. 141, sub Bonnell: 185; Green: 90; McKyring: 33; 2 Bouv. Dic.; Melone, 129 Cal. 514, 79 Am. St. 127 (payment must be proved by a defendant although a plaintiff must allege). See *Actore, etc. Quod est inconveniens, etc. Cited, § 51, Gr. & Rud.*

NEGATIVE AND POSITIVE PROOFS: distinctions, sub Bonnell: 185. *Unus testis, etc.*

NEGATIVE, PREGNANT PLEADINGS, faulty. 2 Bouv. Dic. 478; Bliss, Pl. 332; And. Dic. *Denials bad. Tate v. P.*

NEGLECT: Is an important branch of torts, and is defined as is the latter (Blyth). *Rodgers v. Mo. P. R. R.* Its leading discussions involve:

Remoteness as a defense. In jure non remota, etc.; Scott (Squib Case); Thomas v. Winchester; Langridge; Woodward; Missouri R. R.; Winterbottom; Quis sentit commodum sentire debet et onus.

Accidents, when a defense. Actus Dei, etc.; Fletcher v. Rylands: cases; Coggs v. Bernard: 350; Rodgers v. Mo. P. R. R.

Liability of principal for acts of agent. M'Manus: cases; Qui per alium facit; Qui sentit commodum.

Contract, how involves. Coggs: 350; BAILMENTS.

Contributory negligence, when a defense. Volenti non fit injuria; Yarmouth; Nullus commodum capere potest de injuria sua propria: He who seeks equity must do equity. One cannot charge the consequences of his own act to another. Salus populi suprema lex. U. S. v. Capper (one is not his brother's keeper).

Imputed negligence. Waite; Thorogood; Squib Case.

Negligence.—

Dangerous premises; Liability for keeping. Indemaur; Heaven; Todd; Nelson; Sic utere; NUISANCE.

Gross negligence supplies the element of malice in criminal law. R. v. Lowe; R. v. Longbottom; R. v. Hull.

Intent is no element in trespass. Mahan v. Brown. See INTENT; In jure.

Liberal rules of immunity extend to the state and its public agencies. Rex non potest peccare; Hill v. Boston. See NECESSITY; GROUNDS AND RUDIMENTS OF LAW; §§ 45-71, Gr. & Rud.; DAMAGES: MAXIMS; CASES.

Procedure involving. General allegations, when sufficient. King: 205.

Presumption from happening of accident. Res ipsa loquitur; Kearney: 211; Byrne; Stokes: 207; Hammack: 208.

The obligation to protect. Each person is his brother's keeper, how far. Thomas v. Winchester; Winterbottom v. Wright: cases; Heaven v. Pender: cases; U. P. R. R. v. Capper; Volenti non fit injuria. One not responsible for a wrong cannot rightfully be made liable therefor. To hold him so would be in violation of the social compact and its obligations.

Every one is presumed to intend the natural, direct and probable consequences of his act, is a leading rule in many relations. *Qui primum peccat ille facit rixam; Scott v. Shepherd (Squib Case).* This rule rests on convenience, reason, public policy and necessity. It is a fundamental requirement. *In jure.*

Burden of proof. Actore non probante reus absolvitur; Semper praesumitur pro negante; Et incumbit; Allegata et probata must correspond; Wabash: 137. See also, L.C. 205-211 (EVIDENCE).

Negligence, along with damages, is one of the leading branches of tort. A definition of the latter includes negligence in a most suggestive way. The following will define the trunk and also the limb, namely: A voluntary wrongful act of omission or of commission causing an injury is actionable.

Blyth; R. R. v. Jones (1877), 95 U. S. 439; N. P. R. v. Adams (1904), 192 U. S. 450 (how affected by contract; R. R. v. Lockwood, L.C. 352); 2 Bouv. Dic. 478-484; And. See TORTS; 29 Cyc. 400-660.

The general standard of care is such as a reasonably and ordinarily prudent person would observe under all the circumstances. This of course varies with the facts of each case. *Davies v. Mann.* It may be stated thus: "Failure to use that degree of care which the law imposes on the party as a legal duty under all the circumstances of the particular case." This care varies as considered from various subject-matters, conditions and circumstances, e. g., greater care is required where children are concerned (Lynch; McDermott), or where explosives or firearms or poisons are used.

Sometimes specific acts are en-

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joined when failure in that regard is *negligence per se*, as where railway trains are limited as to speed in towns, or negligence in law. Most frequently specific acts are not enjoined, but the degree of care to be observed is prescribed. The term is used to cover all failures of duty, intended as well as inadvertent. *Scott v. Shepherd*.

Throughout the law of trespass, lack of intent is no defense. An infant may commit a tort, or be guilty of negligence, also an insane person. Therefore a wrongdoer cannot relieve himself from responsibility by showing the absence of allegations or of proof that the tort was not intended. The absence of intent can only affect the question of exemplary damages. Exemplary damages are never allowed for inadvertence, unless it is so great as to evince gross recklessness, but it is always recoverable for wilful injuries.

The legislature will sometimes take up a particular matter and declare that certain omissions will be deemed negligence. The basis of such statutes is usually upon the same principle as we are now discussing, that is, the legislature believes that a reasonable, prudent person, under given circumstances, would do certain things, and so declares that a failure to do so is negligence. Or again, the legislature, without naming certain acts as negligence *per se*, will gather the general rule as to the degree of care which would be used by a person of ordinary prudence under certain circumstances, and declare as a matter of law that such degree of care must be observed by all persons in such cases. Such is the employer's liability act (Yarmouth; Busw. Pers. Inj.) or an act prohibiting the swinging of a sign into a street. (Salisbury.)

The rules of law, whether deduced and announced by the courts from actual experience, or announced by the legislature, are binding on both judge and jury and must be followed by them in all cases to which they apply.

More frequently, however, the degree of care is not indicated as a matter of law further than that it is embodied in the general doctrine that every man must observe that degree of care for the safety and well-being of others which a reasona-

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bly prudent man would, under the circumstances, and it is required of the jury to say in any given case whether that degree of care has been exercised. This is well illustrated in discussions of the maxim *Sic utere tuo ut alienum non ledas*. There are great discussions relating to the power of parties to contract for immunity from their negligence. Generally, this power is denied.

In all cases the degree of care, whether it has been specifically designated by the courts or legislature, or is left in the general doctrine of such case as an ordinarily prudent person would use, is a matter of law, and whether that care has been used in any case is always a matter of fact, unless the legislature has specifically prescribed that the doing of the act on the one hand and the not doing on the other is to be regarded as negligence *per se*. Statutes establish many such rules.

For protection, the law places limits upon the rights of parties to stipulate for immunity from liability arising from negligent acts. For reasons of public policy no one can contract for the privilege of committing crime or gross, wanton or reckless injuries upon the persons of parties. *L. C. 252*; *R. R. v. Hamler*, 215 Ill. 525, 106 Am. St. 187; cases (degrees of); *R. R. v. Lockwood*. The very general rule that one may contract as he pleases is limited by the public welfare. (Hughes' Conts. 14-18; *Osgood v. R. R.*; *Salus populi*, etc.) Another general rule is, that one may waive any right, whether given by contract, statute or constitution [*P. v. Police Commrs.* (1903), 174 N. Y. 450, 95 Am. St. 596; *Modus et conventio vincunt legem*], but he cannot waive his right to protection from criminal or reckless wrongs. Concerning these are nice and extended discussions along lines of close or overlapping relationships of contract, tort and crime. The law of master and servant is also involved in these discussions. Whether or not the employe assumes the usual and incidental risk of an employment is often a fine and a vexed question. *M'Manus*: cases. It is generally determined from a consideration of each particular case. The question is often involved with contributory negligence (*Volenti non fit injuria*), which is discussed in relation to *Davies v. Mann*.

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The law is less liberal for the employee than it is for the shipper or passenger. Nothing will excuse the carrier of freight except the act of God, the public enemy, inherent vice in the article transported or wrong by the shipper in relation to the thing shipped. Whitney: 112. These differences greatly affect procedure, as remains to be noted.

Again, assured persons may recover from underwriters of insurance contracts for losses caused by the inadvertence or carelessness of the assured, but not for his wilful, wanton or designing acts. If one is injured or killed, or his property burned by his carelessness or inadvertence, the insurers are liable. They cannot raise the defense of contributory negligence as it is raised and made available in certain other cases.

The foregoing illustrations show wide extremes of the policy of the law relating to the question of negligence. The important and determining rule is ably discussed in the widely cited cases of *Railway v. Lockwood*, *Hollister v. Nowlen* and *Coggs v. Bernard*. The student should familiarize himself with these and the other great cases cited herein.

From the definition of negligence it appears that, to be actionable, it must result from an act of commission or omission in violation of a law commanding or forbidding it; consequently it must be the natural, direct and probable cause of the injury complained of. Rogers (citing the foregoing text. Also the *Squib Case*, *Guille* and *In jure non remota*). This rule is deducible from the *Squib Case*, already cited.

In jure non remota; *Nullus commodum capere*; *Qui primum peccat ille facit risum*; 164 U. S. 496. See CAUSATION; Whart. Negligence; Labatt, Master & Servant, 802a-815; Fletcher v. Rylands, 1 Rul. Cas. 235; *Sic utere tuo ut alienum non laedas*.

This principle is applied to one who brings upon his premises noxious things, such as water, fire, explosives, ferocious animals, noxious fumes or gases, electricity, or sells poisonous drugs under harmless labels, or who uses deceit in the sale of provisions.

Around that rule will be found volumes of discussion.

Whoever does a wrongful act is liable for all the consequences that

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may ensue in the ordinary and natural course of events, though such consequences be immediately and directly brought about by intervening causes, if such intervening causes were set in motion by the original wrongdoer. *In jure*; C. v. Moore.

If an independent agency intervene, this will break the causal connection, unless under all the circumstances of the case this intervention itself should have been anticipated. This is illustrated by the old and widely cited "*Squib Case*," wherein the facts were: Shepherd, an infant, while at a fair, threw a squib, not caring where it fell or what would result; it fell on one Yates' gingerbread stand, from which it was thrown by one Willis, a bystander, to protect the stand, as well as himself, from the consequences of an imminent explosion. Next it fell on one Ryall's stand, who, like Willis, again threw it, when it struck Scott and knocked his eye out. Scott sued the boy, Shepherd, and recovered without regard to his intent, upon the principle that all persons, including infants, are presumed to intend the natural, direct and probable consequences of their voluntary acts. Willis and Ryall stood fair before the law, because each of them acted in defense of property and person; for that they had a right to act. The law of self-defense is founded on necessity and excuses one acting under its influence. Likewise one seizing and holding the body of another for protection from a dangerous instrument, such as a bomb, is excused. *Laidlaw v. Sage*, sub *Squib Case*.

As stated above, the law requires each person to use such care for the safety and well being of others as an ordinarily prudent person would have used under all the circumstances of the case, and failure to use such care is negligence. For negligence to be actionable in behalf of any particular person, it must be a failure to perform some duty to him. Often the same acts or omissions will be actionable negligence as to one person, but not to another. When this is true, it is always because there are different relations existing between the parties. The most frequent and perhaps clearest illustration of this is found in the operation of a railway pas-

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senger train. The passengers have all paid fare to be safely carried from one place to another. The company has undertaken to carry them in consideration of this fare so received. This contract it cannot possibly fulfill without employing others to manage the train, so it takes some of the money received from the passengers and pays other persons to act for it in running the train, thus enabling it to meet its obligations. It is perfectly apparent that the relations between the company and these classes of persons are very different. The law recognizes these differences, and says the care it must observe for the safety of these classes shall be different. As to the passengers, as we have before stated, it requires the highest degree of practicable care; as to servants only ordinary care. Now, it may be readily conceived that an accident might occur under such circumstances as to be actionable negligence to the passengers which would not be such as to the servant. It is well to observe here that these varying views and rules greatly affect the procedure involved.

The same thing is true as to the care of one's own premises. The owner of land must use ordinary care not to have his premises in such a condition as to result in injury to his servants or guests, and if he does not do this, and injury results to such a person, he is responsible. But he does not owe this duty to trespassers, and if one unlawfully comes on his premises and is injured there, he cannot recover unless he can show such extreme neglect and indifference as to be equivalent to wilful injury. *Indemaur v. Dames*; *Sic utere tuo ut alienum non lēdas*. Some courts concede that legislatures can take away the defence of contributory negligence. *Fulton*, 133 Fed. 193, 68 L. R. A. 168. They deny the principle in *Davies v. Mann*; and that the author of his wrong should bear the consequences. *Nullus commodum capere*.

Contributory negligence. This is negligence on the part of the person injured combining with the negligence of the party complained of and directly and proximately contributing to the injury. The test of negligence here is the same as ap-

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plies to the conduct of the party complained of; that is, it is the failure to use that degree of care for one's own safety which a person of ordinary prudence would have used under the circumstances of the case.

See Beach, Contrib. Neg.; Volenti, etc.: cases; Bolin, 108 Wis. 333, 81 Am. St. 811-829, n. (comparative negligence rejected).

It is a complete defense against injuries inflicted by simple negligence. It does not, however, constitute a defense against wilful wrong. There are limitations of *Volenti non fit injuria*. As the party's conduct is to be judged by all the facts and circumstances of the case, it follows that, if the wrong of the party complained against has put the complaining party in a position of real or apparent peril, the conduct of the complainant is to be judged by those circumstances, and also the frailty of human judgment is to be taken into account, and he is not under such circumstances to be barred from a recovery because he did not act as coolly and deliberately as he would have acted under other circumstances. He is required to do only what a reasonably prudent man would have done under the facts as they reasonably appeared to him. *Davies v. Mann*; *Hutch. Carr.* 662; *Suth. Dam.* 39; *Stokes*: 207.

Imputed negligence. This is negligence of one person imputed to, or, so to speak, charged up to another.

Waite; Thoroughgood, 8 C. B. 114, *Busw. Pers. Inj.* 105, 216, sub. *Squib Case*; 70 L. R. A. 681; *Markowitz v. R. R.*, 186 Mo. 350, 69 L. R. A. 389, n. (driver's is that of passengers).

Husband's is not wife's. *Southern Ry.*, 128 Ga. 383, 119 Am. St. 390, n.

One person is legally liable for the conduct of another, as in case of joint trespassers. The master is responsible for the negligence of his servant in the conduct of his business. The same is true of principal and agent. Of course, it must be negligence within the real or apparent scope of authority. *M'Manus; Qui sentit commodum*. Ordinarily the husband is responsible for the negligence of the wife on the principles already discussed. The old rule was, the husband is liable for the torts of the wife.

Henley v. Wilson (1902), 37 Cal. 273, 58 L. R. A. 941, n.; *Contra cases; Duval*, 134 N. C. 331, 65 L. R. A. 722 (doctrine liberally applied); *Gibney v. S.*, 137 N. Y. 690, 33 Am. St. 690, 19 L. R. A.

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365, Busw. Pers. Inj. (father drowned to save child from falling from a bridge negligently kept); Pa. Co., 48 Ohio St. 180, 4 Am. R. R. & Corp. R. 290, 36 Am. St. 247, 13 L. R. A. 613, n.; Walker, 41 La. Ann. 795, 17 Am. St. 417-429, 7 L. R. A. 111.

The parent, as such, is not responsible for the negligence of the child, nor the child for the parent. Joint tort-feasors would ordinarily be liable if the facts could be found under which the commission of the act came within the scope of the common enterprise. This doctrine also applies to contributory negligence, and if one in privity with the injured party were guilty of contributory negligence, this would defeat the right to recover.

It has been held that negligence of the husband contributing to the injury of the wife will ordinarily defeat her recovery, though his joinder with another in an intentional wrong against her will not. Contributory negligence of a servant will defeat recovery of the master, but this rule does not apply to common or private carriers for hire; and if they shall be guilty of such conduct as to constitute contributory negligence, unless it is participated in by the injured person it will not defeat recovery.

In tort cases, like *Scott v. Shepherd*, *Fletcher v. Rylands* and *Thomas v. Winchester*, as in all others, the wrongdoer is legally liable for all the injuries that are the natural, direct and probable consequences of the wrongful act. *In jure*. Criminal law phases of this question are discussed under what is called collateral and tacking intent. *Spies v. P.*; *McClain*, C. L. 121, 196; *C. v. Moore*.

Discussions of negligence often involve considerations of the law of accidents. *Actus Dei*. But accident is no defense where any negligence contributed to the wrongful act. *Salisbury*.

Criminal law. Negligence is extendedly discussed in criminal law, where the rule is that gross negligence or recklessness supplies malice. *R. v. Lowe*. *McClain* C. L., *Bish*, C. L., *Mews' E. C. L.*; 5 Am. Cr. Rep. 391. Had the squib killed Scott, then upon principle *Shepherd* would have been criminally liable. That case involves interesting phases of criminal law, as already noted.

Omission to discharge a legal duty,

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whereby death is caused, is an interesting phase of negligence.

R. v. Lowe, *supra*; *R. v. Conde*; *R. v. Longbottom*; *R. v. Hull*; *R. v. Salmon*; Preface *Hughes' Conts.*; *R. v. Hughes* (failure to perform duty); *R. v. Smith* (failure to furnish food). §§293, 294, Gr. & Rud. *Where there is no duty there is no negligence*. *U. P. R. R. v. Cappler*; *Volenti*.

It is very important to note in all cases involving contract, tort and criminal viewpoints, that where there is no duty there is no negligence. From the contract, express or implied, the tort or the crime attaches. This is repeated to impress it.

Baltimore R. R. v. Cox (1902), 66 Ohio 276, 94 N. E. 119, 90 Am. St. 583, n.; *Missouri, K. & T. R. R. v. Wood*, *supra* (allowing a patient infected with a contagious disease to escape from a hospital and impart it renders a railroad liable); *Decker*, 116 Wis. 643 (horse running at large in violation of ordinance and killing a person).

Negligence of public corporations. *Hill v. Boston*. See *Ultra vires*. Private corporations are liable, like individuals. *Merchants' Bk.* (the fraud of the agent is the fraud of the principal); *Qui sentit commodum*.

Negligence in executing contracts. *Williams v. Stoll*; *Young v. Grote*; 2 Gr. Ev. 122; 3 Kent, 82; *Ewart*, Estop. q. v.; *Ans. Conts.* 125.

In selling dangerous things to children, whereby they injure themselves. *Carter v. Towne*; *In jure*.

Sale of dangerous instruments by means of deceit. *Langridge*; 46 L. R. A. 33-122 (excellent resume); 36 Am. St. 815 (resume of principle); *Suth. Dam.*

Sale of poisonous drug under harmless label. *Thomas v. Winchester*; 46 L. R. A. 117; 36 Am. St. 814; 2 Mech. Sales, 378, Cool. Torts, Bish.; *Blood Balm Co.*, 83 Ga. 457, 20 Am. St. 324, n. (wholesale and retail dealer alike liable). *Woodward v. Miller*. See *PRIVITY*.

Procedure. Negligence involves great questions of procedure, such as the presumption, *Res ipsa loquitur*. We have already noted the rule of evidence in the *Squib Case*. See *EVERY*.

How to state a claim for damages is often of great concern. We cite extended discussions:

General allegations, when sufficient. *Birmingham R. R.*, 146 Ala. 267, 119 Am. St. 27 n.

King v. Or. Short Line R. R., L.C. 205 (general allegations aided). *Cf. L. & N. R. R.*, 125 Ala. 237, 50 L. R. A. 620.

Holland v. Barch (1889), 120 Ind. 46, 16 Am. St. 307; *Labatt, Master & Serv.* 850-867, B.H.S., Pl. 211a-310a, *Bouv. Dic.*: cases; *McCully*: 206; *cited*, *Whart. Ev.*, *Whart. Neg.* (plaintiff must allege and prove); *Actore*; *Gibson v. Canadian Co.* (1902), 1 Alas. 407 (personal injury—facts sufficient).

Presumption of negligence from happening of accident; *Res ipsa loquitur*. *Kearney*: 211; *Hammack*: 208 (widely cited in negligence and torts); *Byrne*: 209; *stated*, 107 Cal. 549, 48 Am. St. 151, 29 L. R. A. 718; *Actore*; *Gleason*, 140 U. S. 435, *Busw. Pers. Inj.* 189;

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Judson, 107 Cal. 549, 48 Am. St. 146; cases; 29 L. R. A. 718 (explosion raises presumption of negligence); Long, 147 Pa. 343, 30 Am. St. 732, 14 L. R. A. 741 (baggage lost in Conemaugh disaster which destroyed Johnstown and all in the valley); Stokes, 207; 2 Gr. Ev. 221, Suth. Dam., Hutch. Carr., Cool. Torts, Bish., Jag.; Chit. Conts., 2 Kent, 601; Patton, 179 U. S. 658; Chicago R. R., 163 Ill. 477, 54 Am. St. 478; Coggs, 350.

Pleading and proving contributory negligence is a nice question in procedure. Chitty v. R. R.; Rideout. Where the defense does not necessarily arise from the plaintiff's record, then on principle it must be pleaded like all other defenses, or it is waived. This must be considered from masses of conflicting cases. *O'Malley*, 158 Mass. 135, 47 L. R. A. 161-200, ext. n.; 2 Suth. Dam. 413-469 (procedure); Bouv. Dic.: cases.

Defenses upon the doctrine of *Volenti non fit injuria* must generally be pleaded. Labatt, Master & Serv. 368-386, 888. The hirer of a thing returning it injured has presumptions in his favor. Maloney, 60 Vt. 571, 6 Am. St. 135.

To determine who must allege and prove depends upon the contract, as already explained. Accordingly appears how rules of procedure are affected by contract, and how these act and react upon each other. To the injured passenger and to the injured employee of the carrier, in the same car, and if you please, in the same seat, attach different rules of pleading and of proof. The reason for this is found in their respective contracts. And so it is with hundreds of cases arising from that original compact of society, a part of which is *Sic utere tuo*, etc. From the contract we start, then look for the tort, the crime, elect a remedy, consider its requirements in procedure, and what will satisfy its dominating principles—its conserving principles. *Wabash Railroad v. Friedman*: 137 (very strict rule); Rideout.

Prolixity is to be avoided. Still required facts must be pleaded to identify the wrong in order to serve dominating principles, such as requirements of appellate procedure, to resist objections upon collateral attack, for *res adjudicata* purposes, and all the diverse and varied requirements of due process of law. For all these there must be sufficient certainty to set forth and to identify. For these certainty is required. See JURISDICTION; CERTAINTY; DESCRIPTION; PLEADING.

NEGOTIABLE INSTRUMENT: See COMMERCIAL PAPER; Miller v. Race; Overton v. Tyler; Swift; 2 Bouv. Dic. 484; 3 Page, Conts. 1290, 1305. *Assignatus utitur*, etc.; *Qui prior tempore*.

NEILSON v. HARFORD (1841), 8 Mees. & W. 806, 823-826; 20 Rul. Cas. 56, Jones, Construc., 2 Gr. Ev., Beach, Conts., Bro. Max.; Partridge v. Ins. Co.; Mews' E. C. L.; § 68, Hughes' Conts., Sm. Conts. 540, 2 Whart. 631, 647.

Cited, §§ 90, 103, Hughes' Proc.

Construction of contracts is for the court. Cutler: 308; Sattler, 160 N. Y. 291, 73 Am. St. 686.

Neilson v. Harford.—

Patents are construed between their four corners. Neilson Case.

Omission of essential matters from a patent specification—anything necessary for the beneficial enjoyment of the invention—is a fatal defect. Neilson. *Expressio unius, etc.*

NELSON v. LIVERPOOL BREWERY Co. (1877), L. R. 2 C. P. Div. 311, 5 Cent. L. J. 312, 46 L. R. A. 83, 110; 92 Am. St. 499-559; Moak, Torts, 249, Pollock, Hale, Jaggard; 115 N. Y. 208, 6 Am. St. 160; Mews' E. C. L.; cited, Tay. Land. & Ten. 175a, Wood, Land. & Ten., p. 921, Thomp. Neg., Busw. Pers. Inj. 89.

Nuisance; negligence; landlord and tenant; injuries from non-repair of buildings; when landlord, and when tenant is liable to third persons for non-repair. Neilson Case; Wasson, 117 N. Y. 118, 5 L. R. A. 794, n.; Todd; A'Hern, 115 N. Y. 203, 12 Am. St. 778, n., 5 L. R. A. 449 (heirs, when liable for ruinous condition of inherited premises); Griffin, 128 Mich. 653, 92 Am. St. 496-559, ext. n.

Lessor of railroads. Liability of lessee company's acts. Nugent, 80 Me. 62, 6 Am. St. 151, n.

NELSON v. ROCKWELL: L. C. 129.

NEMO ALLEGANS SUAM TURPITUDINEM audendus est: No one alleging his own turpitude is to be heard as a witness. 1 Gr. Ev. 383; And. Dic. 1064; Davis, 94 U. S. 423, stating and applying Walton v. Shelley; Dash: 237a; *Allegans contraria*, etc.; *Nemo admittendus*, etc. See REPUGNANCY.

NEMO COGITUR REM SUAM VENDERE, etiam justo pretio: No one is bound to sell his property, even for a just price. See EMINENT DOMAIN.

NEMO DAT QUI NON HABET: No one can give who does not possess. Mech. Sales, 154; Bentley; *Non dat qui non habet*; *Assignatus*, etc.

The owner of property can only be divested of it by his assent or consent, express or implied. Property is closely safeguarded by high guarantees. *Id quod nostrum*; *Res inter alios*. This guaranty is supported by many principles of the prescriptive constitution.

NEMO DEBET BIS VEXARI PRO UNA et eadem causa: No one ought to be twice vexed for the same cause. Bro. Max. 326-352; P. v. Corning; C. v. Cummings; R. v. Vandercomb; 73; R. v. Vaux; 72; U. S. v. Perez; 69, all in B. & H. Lead. Crim. Cas.; Wonderly: 102; Outram; 26; Cromwell; 26; Bloom; 266; Borden; 267; Starbuck; 263; Wright v. Griffey; 28; Greeley; Martin; Hughes v. P.; C. v. Roby; 74; Kirkwood; White; 175; Miller v. Hyde; Marriott; Bender-nagle; Merest; C. v. Holder; C. v. Up-richard; Bauerman; 48; 2 Chit. Conts. 1169; 2 Bouv. Dic. 898; Archbold, Pract. (Chitty ed.) 476; *Nemo debet bis vexari*; P. v. McDaniels (1902), 137 Cal. 192, 92 Am. St. 81-159, ext. n.; Kepner v. U. S.

Max. No. 7, §§ 120-146; cited, §§ 19, 32, 120-146, 214a, Hughes' Proc., also p. 10, id.

Cited, §§ 63, 91, 152, 171, 173, 258, Gr. & Rud. See L. C. 25-28, 69-76; cases; RES ADJUDICATA: cases.

Protection of this maxim depends on procedure. The mandatory record must be pleaded and the record must be sufficient. The protection is not against a second judgment, but is against a second

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trial. *Keppner v. U. S.*, 195 U. S. 100 (the indictment must be sufficient). See **MANDATORY RECORD**; *Outram*: 25; notes, *C. v. Roby*: 74; **FORMER JEOPARDY**; **RES ADJUDICATA**. Depends on pleadings. See *id.*
Exemplary damages allowed for criminal acts. See **DAMAGES**; *Merest*; *Wagner*: 290.

Nemo debet bis vexari, si constat curiam quod sit pro una et eadem causa: No man ought to be twice punished, if it appear to the court that it is for one and the same cause. *Bro. Max.* 327, 348; 92 *Am. St.* 93; *Keppner v. U. S.*

Autrefois acquit or autrefois convict must be pleaded. 1 *Bish. Crim. Proc.* 808, 814, 815; *U. S. v. Perez*: 69; *R. v. Vaux*: 72; *R. v. Vandercomb*: 73. See **MANDATORY RECORD**; **RES ADJUDICATA**; 23 *Colo.* 383.

NEMO DEBET ESSE JUDEX IN PROPRIA SUA CAUSA: No one should be judge in his own cause. *Bro. Max.* 116-122; *Dimes*: 176; *Keach v. Sandford*; *Meyer v. San Diego*; *Michoud v. Girod*; *Oakley*: 222; 12 *Coke*, 114; 2 *Bouv. Dic.* 21 (*Judge*); *And. Dic.* 574; *Freem. Judgts.* 147; 148; 1 *Bish. Crim. Proc.* 814; *Whart. Cr. Proc.* 605; *Van Fleet, Coll. Att.* 49, 50; 1 *Bigl. Fraud*, 200, 201; *Bank*, 12 *So. Dak.* 226, 76 *Am. St.* 598-603, n.; *Crook*, 124 *Ala.* 479, 82 *Am. St.* 190 (degree of relationship); *U. S. Bank v. Bank*, 5 *Okl.* 163 (*cites Dimes*: 176; debtor judge cannot appoint a receiver for his creditor).

Max. No. 12, §§ 158-167, *cited*, §§ 5, 11, 20, 51, 52, 109, 147, 151, 152, 158a, 160, 161, 166, 167, 178, 214a, *Hughes' Proc.*

Cited, §§ 62, 63, 70, 119, 134, 264, 268, *Gr. & Rud.*

Nemo debet esse in a fundamental principle of the common law. *Dimes*: 176; *Oakley*: 222; *Keach*; *Michoud*. It cannot be waived. *Dimes*: 176; *Kleber, Sales*, 138. Only the allegations presented by the parties can be passed upon. *S. v. Baughman*: 268. If a court imagines and passes upon a fictitious state of fact, this binds no person and no thing. In effect the court has only passed on its own dispute, for certainly it has not passed on the dispute of the parties. *Cohene*: 244; *Marbury*: 142; *Bro. Max.* 329, n., 342; *Fabula non judicium*; *Jurisdiclio est potestas*. Sheriff cannot serve his own process. See *Keach*. A receiver must be disinterested. *Baker*, 32 *Ill.* 79; *U. S. Bank*, 50 *Okl.* 163.

Judge: disqualifications of; having been district attorney and drawing the indictments, is not. *Kirby v. S.* (1900), 78 *Miss.* 175, 84 *Am. St.* 622.

This maxim is a part of the prescriptive constitution. It appears as such in many cases. *Dimes*: 176; *S. ex rel. Henson v. Sheppard* (Mo.) (Interested clerk cannot act). § 63, *Gr. & Rud.*

NEMO DEBET LOCUPLETARI EX ALTERIUS INCOMMODO: No one ought to be made rich out of another's loss. See **UNJUST ENRICHMENT**; *Cutter*: 308; *Nul ne doit*. *Bright v. Boyd*. This case, like the decisions in the year books, is decided from maxim guides, or *datum posts*. See also, 29 *Mo.* 152.

NEMO EST HAERES VIVENTIS: No one is an heir to the living. *Bro. Max.* 522-525; *Shelley's Case*; 2 *Bl. Com.* 70, 107, 208. *Heirs*; who are. See **HEIRS**. *Cited*, § 110, *Hughes' Conts.*

NEMO PRESUMITUR MALUS: No one is presumed to be bad. Evil is never pre-

Nemo Presumitur Malus.—

sumed. *Malum non presumitur*; *Nihil nequam*, etc. Fraud must be alleged and proved. *Actore*, etc.

NEMO TENETUR SEIPSUM ACCUSARE: No one is bound to accuse himself. *Bro. Max.* 967-973; *V. Amend. Const. U. S.*; *Bram v. U. S.* (1897), 168 *U. S.* 352, 10 *Am. Cr. Rep.* 547-584, 18 *Sup. Ct.* 183, 42 *L. ed.* 686, ext. n. (quotes maxim, discusses confessions and cites leading cases); *Thornton v. S.* (1903), 117 *Wis.* 338; cases; 1 *Gr. Ev.* 451-458, 1 *Whart. Ev.* 533-548, 2 *Kent*, 12, 2 *Beach. Eq.* 871, 872, *Adams*, 117, *And. Dic.* 12, 9 *Crim. Law Mag.* 293-307; *Louisville R. R. v. Hall* (1890), 91 *Ala.* 112, 24 *Am. St.* 863, n.; *Interstate Com. Comm. v. Brimmon* (1894), 154 *U. S.* 447, 38 *L. ed.* 1047, 14 *Sup. Ct. Rep.* 990, 10 *Am. R. & Corp. Rep.* 469-512, n.; *Temple v. C.* (1881), 75 *Va.* 892, 2 *Crim. Law Mag.* 645-657, n., 4 *L. R. A.* 766; *Brown v. Walker* (1896), 161 *U. S.* 591, 40 *L. ed.* 819; *Jack v. Kansas*; *Hale v. Henkel*, 201 *U. S.* 43; *Senior*, 37 *Fla.* 1, 32 *L. R. A.* 133; *Evans*, 174 *Mass.* 287, 75 *Am. St.* 316-347, ext. n.; 3 *Wigm. Ev.* 2240-2282.

This maxim is a principle of the prescriptive constitution, which must be respected by all governments whose proceedings are accusatory and not inquisitorial or barbarous in form. Reaffirming it in written charters has made no change in its principles nor in its application and in its protection. It does not deserve the prominence given it in supposed American law simply because constitutions contain a paraphrase of it.

Counselman v. Hitchcock, *L.C.* 178; 75 *Am. St.* 316, q. v. (privilege of witness from self-crimination); *Fries v. Brugler* (1830), 7 *Halst. (N. J.)* 79, 21 *Am. Dec.* 52-62, ext. n. (privilege—practice—important rule).

Max. No. 39, §§ 19, 325, 341, 349-353, *Hughes' Proc.*

Cited, §§ 263, 271, 272, 293, 294, *Gr. & Rud.*

Principles of the common law are safeguarded and protected, as if reaffirmed in constitutions. 2 *Kent*, 8, 12; *Counselman*: 178; *Dash*: 237a; *Bronson*: 238.

Nemo tenetur seipsum accusare is from the common law and reaffirmed in *Magna Charta*. *Blum v. S.*, 94 *Md.* 375, 46 *L. R. A.* 322, 325.

Admissibility in evidence against accused of documents or other things taken from him. *S. v. Edwards* (1902), 51 *W. Va.* 220, 59 *L. R. A.* 465-477, ext. n.; 1 *Gr. Ev.* 254a; *Adams v. New York*; *Buskett* (1891), 106 *Mo.* 602, 9 *Am. Crim. Rep.* 760; *cited*, 117 *Wis.* 336; *Bram, supra*. See **ARREST**.

Statement of prisoner; right to make. A prisoner may make a statement in addition to the arguments of his counsel. Prior to 1836, prisoners were not allowed counsel in cases of felony. In that year the law was changed by statute, but this does not take away the right of the prisoner to make his statement in addition. *R. v. Doherty* (1887), 16 *Cox. C. C.* 306; 1 *Bish. C. L.* 414, 2 *id.* 672, 675. *The accused as a witness.* 1 *Bish. Crim. Proc.* 1181-1187; 4 *Crim. Law Mag.* 325-358; *Cool. Const. Lim.* 385, 386, n. This

Nemo Tenetur.—

provision is not to be defeated by hostile intimations of the judge. *Allison v. U. S.* (1895), 160 U. S. 203; *Wilson v. U. S.*, 8 Encyc. Pl. & Pr. 147-152.

Prisoner's failure to testify is not to be commented on. *Cool. Const. Lim.* 385; *P. v. Tyler* (1869), 36 Cal. 522, 529; *Devries*, 63 N. C. 53. *Contra: S. v. Cleaves* (1871), 69 Me. 298, 8 Am. Rep. 422-426; *S. v. Duncan* (1893), 7 Wash. 336, 38 Am. St. 888-898, n. (cross-examination of defendant in criminal prosecution).

Testifying waives right to refuse to answer incriminating evidence. *Sawyer v. U. S.*, 202 U. S. 150; *S. v. Thomas* (1887), 93 N. C. 599, 2 Am. St. 351-356; *Low v. Mitchell* (1841), 18 Me. 372; *Foster* (1853), 11 Cush. 437, 59 Am. Dec. 152-154, n.; *S. v. Pancoast* (1896), 5 N. Dak. 516, 35 L. R. A. 518, 532; cases; *Fitzpatrick v. U. S.* (1900), 178 U. S. 304.

Must answer all relevant questions even as to other crimes. *P. v. Duponce*, 133 Mich. 1, 103 Am. St. 435, n.

Right to appeal from an order punishing witness for disobeying. *Alexander v. U. S.*, 201 U. S. 117.

No inculpatory link can be proved by the accused. 1 Gr. Ev. 451, 1 Whart. Ev. 533.

Prisoner as witness under late enabling statutes. *Sub R. v. Doherty*, § 549; *Hughes' Proc.*, § 5 v. *Pancoast* (1896), 5 N. Dak. 516, 35 L. R. A. 518, 532; cases (must answer all questions).

Witness, and not his counsel, must claim his privilege. *S. v. Pancoast*; 21 Am. Dec. 61.

Failure to instruct witness. *S. v. Duncan*, 78 Vt. 364, 4 L. R. A. (N. S.) 1144, n.

Private papers are protected from seizure. *S. v. Davis* (1891), 108 Mo. 666, 32 Am. St. 640-648, ext. n. See *Adams v. N. Y.*

Forfeiture of estate. This stands on same footing as *Nemo tenetur*. 1 Gr. Ev. 453.

Exposure to disgrace. If this only follows he is not privileged from answering. 1 Gr. Ev. 454; 1 Wh. Ev. 533, 548; 1 Best. Ev. 128, et seq.; 2 Tay. Ev. 1313, 1 Wh. C. L. 805-813; *Rosc. Crim. Ev.* 149, n.; *Brad. Ev.* 48; *Brown v. Walker*.

Fraud. Must testify to his own fraud. *Bigl. Fraud*, 398; 1 Gr. Ev. 383-385; *R. v. Hill*. *Contra: Walton; Nemo allegans suam turpitudinem*, etc.

One must testify to his own turpitude, if not criminal, or if criminal, when barred by statute of limitations or otherwise punishable criminally. 1 Gr. Ev. 383-385, 453, 3 id. 278, n.; *Bigl. Fraud*, 498. Or if given immunity by the legislature. *P. v. Sharp* (1887), 107 N. Y. 427, 1 Am. St. 851; *Cohen* (1894), 104 Cal. 524, 43 Am. St. 127, n.; 26 L. R. A. 423, 2 Gr. Ev. 278, n.; *Brown, supra*; *Hale v. Henkel*.

Pecuniary liability as a consequence is no excuse. 1 Gr. Ev. 452; 2 Tay. Ev. 1317; 1 Whart. Ev. 533-548.

Confessions. *Daniels v. S.* (1886), 78 Ga. 98, 6 Am. St. 238-252, ext. n.; 1 Gr. Ev. 213-235, 1 Tay. Ev. 789-828, Whart. Crim. Ev. 623-698; *Hopt.* 110 U. S. 574, 28 L. ed. 262, n.; *Hodge v. S.* (1892), 97 Ala. 37, 38 Am. St. 145, n.; *Lauderdale v. S.* (1892), 31 Tex. Crim. Rep. 46, 37 Am. St. 788, n.; *Gould* (1893), 99 Cal. 360, 37 Am. St. 57, n. (contempt cases, privilege); *Bro. Max.* 967; *R. v. Thompson* (1893), 2 Q. B. 12, 8 Rul. Cas. 90-106, n.; 1 Bish. Cr. Proc. 1216a-1246; *Clark, Cr. Proc.* 212-214; *Wilson v. S.* (1895), 110 Ala. 1, 55 Am. St.

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117, n.; *Bram, supra*; 10 Am. Cr. Rep. 547-584 (states leading cases).

Weight of. 1 Gr. Ev. 214, 215; 1 Tay. Ev. 789-791; 1 Wh. C. L. 683; *Hopt., supra*.

Judicial confessions. 1 Gr. Ev. 216, 1 Tay. Ev. 792, 793. *Extra judicial confessions.* 1 Gr. Ev. 217; 1 Tay. Ev. 794. Must be taken as a whole. 1 Gr. Ev. 218; 1 Tay. Ev. 795; 1 Wh. C. L. 697. Must be voluntary. *R. v. Warringham*; 1 Gr. Ev. 219-226; 1 Tay. Ev. 796-814; 1 Wh. C. L. 685.

Court should determine competency of; should separate from the jury, inquire after, before admitting. *Ellis v. S.* (1887), 65 Miss. 44, 7 Am. St. 634, n.

Compulsory answers, wrung by a grand jury from an unadvised witness, are inadmissible. *S. v. Clifford* (1892), 86 Iowa, 550, 41 Am. St. 518, n.; *Green v. S.* (1891), 88 Ga. 516, 30 Am. St. 167, n.

Inducements. *R. v. Warringham*; *R. v. Moore*; *R. v. Johnston*; 1 Gr. Ev. 222-227; 1 Tay. Ev. 797.

Examinations. 1 Gr. Ev. 224-231; 1 Tay. 809. Imprisonment as inducement. 1 Gr. Ev. 230; 1 Tay. 820; 1 Wh. C. L. 689.

Self-incriminating evidence. 3 Crim. Law Mag. 364.

Arrest for crime; searching prisoner for evidence of guilt. *O'Brien v. S.* (1890), 125 Ind. 38, 9 L. R. A. 323, n.; *S. v. Griswold* (1896), 67 Conn. 290, 33 L. R. A. 227 (evidence obtained is admissible, though illegal); 1 Gr. Ev. 254a; *Adams v. N. Y.*

Concealed weapons. Seizure of person and search for, permitted. *Chastang v. S.* (1887), 83 Ala. 29, 3 So. 304, 10 Crim. Law Mag. 417-421 (*contra* views. One's private books, etc., cannot be seized and so used); *Semayne's Case*.

Search of prisoners; right to make. *Shields v. S.* (1893), 104 Ala. 35, 53 Am. St. 17, n.; Whart. Cr. Pl. & Pr. 60, 61.

Evidence improperly obtained admissible if party offering it is without fault. *Cluett*, 100 Mich. 193, 43 Am. St. 446, n.; *S. v. Mathers* (1891), 64 Vt. 101, 33 Am. St. 921 (court will not collaterally inquire into); 1 Gr. Ev. 254a; *Adams v. New York, ante*; *S. C., sub nom. P. v. Adams* (1903), 176 N. Y. 351, 98 Am. St. 675-689, n.

Search of person for evidence. *Rusher v. S.* (1894), 94 Ga. 363, 47 Am. St. 175, n.

Seizure of goods. *Bish. Crim. Proc.* 210; *Clark, Cr. Proc.* 34; Whart. Cr. Pl. & Pr. 60, 61.

Agreements to turn state's evidence are enforced. *Camron v. S.* (1893), 32 Tex. Crim. Rep. 180, 40 Am. St. 763-775, ext. n.

Credibility of a witness may be affected by inquiries into collateral acts, and in the discretion of the court he must answer these, unless they expose him, and upon this ground, claims privilege. His criminal experiences, arrests and confinements for crime may be inquired after. *Carroll v. S., sub Falsus in uno*, etc.; *Real v. P.* (1870), 42 N. Y. 270. Cannot be compelled to make physical facts to be used against him, e. g., to make tracks in mud or plastic substance. *Cooper v. S.* (1888), 86 Ala. 610, 11 Am. St. 84, n.; 4 L. R. A. 766, n. Nor be physically examined. *Austin R. R. v. Cluck*.

May be compelled to testify against accomplices, and then they may inculpate him. *Buskett*, 106 Mo. 602, 14 L. R. A. 407, n.

NEPHEW v. DOE: Adverse possession. See LIMITATIONS; BURDEN OF PROOF; sub

Nepean v. Doe.—

Bonnell: 185. *Cited*, § 328, Hughes' Proc. Death presumed after seven years. See DEATH; SURVIVORSHIP.

NEUTRALITY LAWS: 29 Cyc. 674-697.

✓ **NEWELL v. DOTY** (1865), 33 N. Y. 83. Answer presenting any one matter may call for a hearing. Every allegation need not be denied.

NEW ENGLAND DRESSED MEAT CO. v. Standard, etc., Co. (1896), 165 Mass. 328, 52 Am. St. 518. *Contemporanea*, etc.; Brown: 54. *Cited*, §§ 289, 294, Hughes' Proc.

✓ **NEW MATTER:** Must be pleaded. *McKyring v. Bull*: 33; *Bliss*, Code Pl. 339-364; 2 Bouv. Dic. 493.

NEWSPAPER: Publications; when contempt. 1 Am. Cr. R. 107, 141. See CONTEMPT; LABEL; 29 Cyc. 692-706.

✓ **NEW TRIAL:** Motion for new trial essential for foundation of assignment of error. § 53, CONVENIENCE, Gr. & Rud. Assignment of error depends on motion for new trial. *Zimmerman v. Gaumer* (1899), 152 Ind. 552: cases, 3 Cent. Dig., § 3024, col. 856; L.C. 296-299; 29 Cyc. 707-1044.

Exception to this is when the error is founded on a fatal defect shown in the mandatory record. *Garland*: 60. And here this need not even be assigned for error, so it is no exception at all. It is sufficient, if in any way defects in the record proper are called to the court's attention. §§ 10-12, Hughes' Proc.

On principle, errors that appear from the mandatory record need not be excepted to. *Garland*: 60; *Rushton*: 5. Nor assigned for error, if in any way they can be gotten before the court. Of course they must be called to the court's attention; compliance of rules for this only is enough, and a court may *sua sponte* look and take notice of defects in the common law record.

Functions of a new trial are to secure a review of issues of fact only. *Foley*, 120 Cal. 33, 65 Am. Stat. 147, n. Of course the court may review questions of law.

Absolute right to, where trial judge dies or is removed. 2 Am. Cr. Rep. 58. See BILL OF EXCEPTIONS.

Points waived by, are waived forever. *Brewer*: 296; 199 Mo. 159.

Assignments of error depend upon. *Brewer*: 296. See *Campbell*: 2.

One voluntarily satisfying a judgment abandons all steps for a review. *Chambliss*, 125 Ia. 484, 68 L. R. A. 126, n. Appellate courts will not review dead issues. *California*: 270.

On principle the grounds for should be made certain and specific; this would tend to aid the preparation of the statutory record, also the assignment of error. However, opposing views are found. *Collier v. Catherine Co.*, 208 Mo. 246, 106 S. W. 972.

Courts should hospitably invite and seriously consider new trials. *Floyd*, 14 Ark. 286, 58 Am. Dec. 374; *Singer*, 150 Ind. 287.

In federal practice the demand for is quite restricted; it is only necessary to secure a review of a finding of fact. *Blitz v. U. S.*; *Moore v. U. S.* (1893), 150 U. S. 57: cases; 37 L. ed. 996. See *Winona*.

Are not generally required in federal practice. *Schuchart v. Allens* (1863), 1 Wall. (U. S.) 359, 17 L. ed. 642.

New Trial.—

Findings upon which a judgment is entered can only be reviewed by a motion for a new trial. *Hawhurst*, 119 Cal. 531, 63 Am. St. 142, n.

Questions made on a demurrer need not be embodied in a motion for a new trial in order to be saved for appeal. It is sufficient that a court once passed upon a point; more than enough is not required. Vain and fruitless things should be excluded in procedure. *Wise v. Morgan* (1898), 101 Tenn. 273, 44 L. R. A. 548.

Matters a court has once passed upon ought not to have to be reviewed by a motion for a new trial. *Lex neminem cogit ad vana*, etc. And so it is in the federal courts, as a general rule.

The misconduct of counsel, other than in argument, may be ground of new trial. *Cleveland R. R. v. Pritschau* (1903), 69 O. 438, 100 Am. St. 682. *Abusive argument.* *Brown*: 161.

On principle the motion for a new trial is a revised and renewed appeal to the trial court for correction of errors and a revised and formal notice of what the court of errors will be asked to review. See ASSIGNMENT OF ERRORS; *Consensus*. It is strictly construed. *Expressio unius; Verba fortius*.

Generally: 2 Bouv. Dic. 494-499; § 53, CONVENIENCE, Vol. I, Gr. & Rud.; ASSIGNMENTS OF ERROR.

NEW YORK: Conflict upon fundamentals. See CALIFORNIA; COLORADO; ILLINOIS; INDIANA; MISSOURI; § 30, Hughes' Proc.

Conflicting cases: 35 Wis. 548, 549; *Rushton* denied and upheld; *Ferguson*: 264, reviewed.

N. Y. CENT. E. R. v. FRALOFF: L.C. 355.

NEXT FRIEND: 2 Bouv. Dic. 500; Sto. Pl.

NICHOLS v. MARSLAND (1876), 2 Ex. Div. 1, 14 Moak, Eng. Rep. 538, 2 Cent. L. J. 523, 4 id. 319, 1 Rul. Cas. 262-276, n., 1 Thomp. Neg. 86, 2 Sm. Cas. Torts, 343, Wood, Land & Ten. 920, Ang. Wat. 114k, Gould, Wat. 297, 36 Am. St. 838, 1 Sedgk. Dam. 33, Cool. Torts, Bish. Torts, 841. *Cited*, §§ 69, 294, Gr. & Rud.

Actus Dei, etc. Artificial lakes caused to break away by storm passes as an accident. *Blyth*. See *Fletcher v. Rylands*; *Gilson v. Del.*

Loss of baggage from Johnstown flood is non-actionable. *Wald*, 162 Ill. 545, 35 L. R. A. 356, n. The loss of baggage in the great Conemaugh disaster speaks for itself. *Res ipsa loquitur*; *Long v. Pa. R. R.*, 147 Pa. 343, 30 Am. St. 732, n., 14 L. R. A. 741.

Cited, §§ 347, 348, Hughes' Proc.

NIGRUM NUNQUAM EXCEEDERE debet rubrum: The black should never go beyond the red (i. e. text of a statute should never be read in a sense more comprehensive than the rubric, or title). *Bobel v. P.*: 250; *Paxton*. See TITLES TO STATUTES; *Verba generalia*, etc.

NIL DAT QUI NON HABET: He gives nothing who has nothing. *Bentley*.

NIL FACIT ERROR NOMINIS CUM de corpore constat: An error in the name is nothing when there is certainty as to the thing. 11 Coke, 21; 2 Kent, 292; see *In verbis non verba*, etc.; *In rebus manifestis*, etc.; *Certum est quod*,

Nihil Facit Error.

etc.; *Falsa demonstratio*, etc.; SUBJECT-MATTER; *Non differunt*, etc.; Hurtado: 220; *Error nominis*, etc.; CHRISTIANITY; Heaton; *Si quidem in nomine*, etc. § 16, Hughes' Proc.

NIL HABET FORUM EX SOEHA: The court has nothing to do with what is not before it. Jurisdiction of subject-matter essential. *Lex non verbis*, etc.; *Ex facto oritur jus*, etc.; McLaughlin: 31. See JURISDICTION; DICTUM.

NIL POSSUMUS CONTRA VERITATEM: We can do nothing against truth. St. Albans, Doct. & Stu. Dial. 2 c. 6. Thou shalt not bear false witness. See SHAM AND FALSE PLEADINGS; Graver: 103; Wonderly: 102; JURISDICTION.

This maxim is one of many that reflect the morals of jurisprudence.

NIL QUOD EST INCONVENIENS est licitum: Nothing inconvenient is lawful. 4 H. L. Cas. 145, 195. See Campbell v. Race. § 53; CONVENIENCE: Vol. I, Gr. & Rud.

NIL SIMUL INVENTUM EST ET PERFECTUM: Nothing is invented and perfected at the same moment. Co. Litt. 230; 2 Bl. Com. 298, n. See title-page, Chit. Pl., Sto. Pl. 25; Gardner v. Buckbee; *Nihil perfectum*, etc.

No code is perfect. See HARD CASES; Graver: 103; CODES.

Cited, p. 1; §§ 37, 40, 43, Hughes' Proc.

NIL TAM CONVENIENS EST NATURALI AQUITATI QUAM UNUMQUODQUE DISSOLVI EO LIGAMINE QUO LIGATUM EST: Nothing is so consonant to natural equity as that each thing should be dissolved by the same means by which it was bound. Bro. Max. 876-892; Hibblewhite; Brookshire; 2d Inst. 360; see Shep. Touch. 323; Sto. Ag. 49, Browne, Stat. Frauds. It takes a statute to dissolve or repeal a statute. Sedgk. Stat.; Smith, Conts. 31.

All of the states made the constitution and less than all cannot dissolve it. It takes a deed to make a deed. Hibblewhite: cases; Smith, Conts. 57. Intelligence of one is presumed. *Ignorantia legis*, etc.

A covenant (under seal) cannot be dispensed with by an oral license. Smith, Conts. 31; 56 Am. St. 669; *contra* cases. See *Modus et conventio*, etc.

NIL FACIT ERROR NOMINIS CUM DE CORPORE CONSTAT: An error in the name is immaterial, if the body is certain. Bro. Max. 634; 11 C. B. 406. *Falsa demonstratio*, etc.; *Certum est quod*, etc.; *Nihil facit error nominis*, etc.; *Scientia scilorum*, etc.; *Scire leges*, etc.; Hurtado: 220. *Non differunt*, etc. See SUBJECT-MATTER. Cited, § 13, Hughes' Proc.

It makes no difference what name is given to a thing that is present and which speaks for itself (*Res ipsa loquitur*).

"A rose by any other name would smell as sweet;

A thorn by any other name would prick as deep."

NIL SINE PRUDENTI FECIT RATIONE VETUSTAS: Antiquity did nothing without a good reason. Co. Litt. 85.

NIMIA SUBTILITAS IN JURE REPROBATUR, et talis certitudo certitudinem confundit: Too great subtlety is disapproved of in law; for such nice pretense of certainty confounds true and legal certainty. Bro. Max. 187-189; Robinson: 45; Russell v. Shurtleff; 4 Coke, 5. See *Ut res magis*, etc. §§ 145, 238, 287, 296, Hughes' Proc.; Perez: 2c; Hahl v. Sugo.

NITROGLYCERINE CASE, 15 Wall. 524.

NIX V. GOODHILL (1895), 95 Ia. 282, 58 Am. St. 434, n.; 80 Am. St. 394. Malicious use of process actionable. Grain-gar. Damages for wrongful attachments and injunctions. Trapnall. See PROCESS; MALICIOUS ACTS.

NIXON V. RUFLE ("What ought to be of record must be proved by record." *Iversallie*: 46): L.C. 127.

NOBLE V. DURRELL: L.C. 251.

NOLES V. S. (1855), 26 Ala. 31, 62 Am. Dec. 711-714, n.; Hor. & Thomp. Cas. Self Def. (1 Crim. Def.) 679, Laws. Lead. Crim. Cas. Simp. 262-264, n. (one may not kill to resist a mere trespass). *Resisting arrest; self defense*. U. S. v. Holmes: cases; U. S. v. Amistad (The); Howard v. S. *Necessitas inducit privilegium*, etc.

NOLLE PROSEQUI: Prosecuting attorney has power to enter. 5 Crim. Law Mag. 11-16; S. ex rel. Butler, 8 La. Ann. 109, 35 L. R. A. 701-721, ext. n.; 12 Cyc. 374; 1 Bish. Crim. Proc. 1387-1396, Whart. Cr. Pl. & Pr. 383, 384, Clark, Crim. Proc. 54; 2 Bouv. Dic. 503; Non Pros., *id.* 509. *Prosecuting attorney has power to enter, not the court*. 1 Am. Cr. R. 542.

NOLO CONTENDERE: Plea of. Bish. Cr. Proc.

NO MAN CAN HOLD THE SAME LAND immediately of two several landlords. Co. Litt. 152.

NO MAN IS PRESUMED TO DO ANYTHING AGAINST NATURE. 22 Viner, Abr. 154. Nature is paramount; presumptions are founded upon it. *Nemo tenetur*, etc. The natural mother will give up her child to spare its life, was illustrated before King Solomon.

NOMEN NON SUPPICIIT SI RES NON SIT DE JURE AUT DE FACTO: A name does not suffice if the thing does not exist by law or by fact. 4 Coke, 107. *Leges non verbis*, etc.; *Nihil facit error nominis*, etc. See NAMES.

NOMINA SI NESCIS PERIT COGNITIO RERUM: If you know not the names of things, the knowledge of things themselves perishes. Co. Litt. 86. Terminology is essential. *Ignoratis*, etc.

NON DAT QUI NON HABET: He gives nothing who has nothing. Bro. Max. 467; Bentley; *Nemo dat*, etc. *Non concessit*: He did not grant. Bouv. Dic.

NON DEBIT ALTERI PER ALTERUM iniqua conditio inferri: A burdensome condition ought not to be brought upon one man by the act of another. Dig. 50, 17, 54. *Volenti*, etc.; *Nullus commodum*, etc. Each should answer for his own wrong. *Nemo punitur*, etc.; *Res inter alios*, etc. Max. No. 37, §§ 334-342, Hughes' Proc.

This is a fundamental principle of the prescriptive constitution.

NON DIFFERUNT QUAE CONCORDANT RE, TAMETSI NON IN VERBIS HISDEM: Those things which agree in substance, though not in the same words, do not differ. Subject-matter is looked to, not names. *Leges non verbis*, etc.; *Ubi eadem*, etc.; Hurtado: 220; *Error nominis*, etc. § 13, Hughes' Proc. Equity looks at substance not form.

NON EST FACTUM: It is not his deed. 2 Bouv. Dic.

NON HABEO IN FOEDERA VENI: I have not come into this compact, or, I did not come into this compact. Bro. Max. 654; § 12, Hughes, Conts.; Smith, Conts. 160. *Natura fide fussionis*, etc. Sureties defend under this when there

Non Haec.—

has been a change of contract. See Rees: 334a; Jordan: 324; Boston: 320; Carter v. Boehm; Schugardt.

The party who made the offer has the right to say, "*Non hæc in fœdera veni*," and to decline any other bargain than that which he offered. Where an offer is accepted in the terms in which it was made, the contract is binding on both parties. At any time before it is accepted the offer may be rescinded, but not afterwards. Smith, Conts. 180; Cooke: 321; *Pacta dant*; Jordan: 324; Shuey: 323 (right to withdraw offer). §§ 186, 227, 334, Hughes' Proc.; § 281, Gr. & Rud.

Non hæc, etc., is a part of *Expressio unius*, etc. It is the defense of a surety when the contract is altered without his consent. Rees; Bull; *Divinatio non interpretatio est, quæ omnino recedit a litera*. Cutter: 308; Suth. Stat. 283. It is analogous to the rule of pleading that there shall be no departure. Variances are forbidden. See **VARIANCE**.

A new contract must have assent, a consideration and all other requisites. 3 Page, Conts. 1341; Smout; Hendrick: 319; Missouri R. R. v. Wood; Boston Ice Co.: 320; *Id quod nostrum*; *Res inter alios*.

NON IN TABULIS EST JUS: The law is not contained in writing. *Lex non exacte*, etc.

Non jus ex regula, sed regula ex jure: The law does not arise from the rule (or maxim), but the rule from the law. Traynor, Max. 384.

NON-JOINDER: Rice: 95; Williams: 93. Not a ground of general demurrer. See Williams v. Bankhead; Bouv. Dic.; 2 Lord Chancellors, 329.

NON OBSTANTE VEREDICTO: Motions of. Hitchcock: 12; Bro. Max. 602; 2 Bouv. Dic. 508; And. 1140; 41 L. R. A. 824.

Cited, §§ 16, 25, 101, 113, 123, 157, 169a, 173, 179, 216, Hughes' Proc.; §§ 201a, 235, 249, Gr. & Rud.

Where a defense is insufficient in law, a plaintiff asks for judgment notwithstanding a verdict has been rendered against him. A defendant cannot make the motion.

Non obstante, etc. In Skeate: 82, filing a replication did not cure the defects in the pleas; these were raised by a motion *non obstante*, etc.

An answer or a plea must be sufficient. As with the statement for judgment, so it is with a response pleading—it must be sufficient. Filing a reply or a demurrer will not cure substantial defects. Cumber: 311; Cooke: 321; Skeate: 82; *Quod ab initio*, etc. *Contra*, Rensberger.

Must be made before judgment entered. Hurd, 142 Mo. 283, 41 L. R. A. 832 (this seems technical).

What may be deduced from. See **DEFENDANTS**; J'Anson: 91. It must be respected exactly as a motion in arrest of judgment.

NON POTES ADDUCI EXCEPTIO ejusdem rei cuius petitur dissolutio: A plea of the same matter, the dissolution of which is sought by the action, cannot be brought forward. Bro. Max.; Mills: 57; Starbuck: 263; *De non apparentibus*, etc. See **JUDICIAL NOTICE**.

Max. No. 3, §§ 86-88, Hughes' Proc.; *cited*, §§ 51, 86, 88, 159a, *id*.

Non Potest.—

When an action is brought to annul a proceeding the defendant cannot plead such proceeding in bar. Mountain View, 180 U. S. 333 (resort cannot be had to judicial knowledge to raise controversies not presented by the pleadings); 139 U. S. 147; Williamson: 65. See Breeze.

NON POTES PROBARI QUOD PROBATIONUM non relevat: That cannot be proved which proved is irrelevant. See *Frustra probatur*, etc.; *De non apparentibus*, etc.; **SURPLUSAGE**; **PROOF**; **Actore**, etc.; **RELEVANCY OF EVIDENCE**.

NON POTES QUI SINE BREVI agere: No one can sue without a writ (a bill or complaint). Fleta, 1, 2, c. 13. See *Citatio*, etc.; Sto. Pl. 10; *Quis*, etc.

NON REPERT AN QUI ASSENSUM suum præfert verbis, an rebus ipsis et factis: It is immaterial whether a man gives his assent by words or by acts and deeds. 10 Coke, 52. Acceptance of deeds may be by conduct. Welborn: 388. See **ACQUIESCENCE**; **WAIVER**.

CONSULT: And. Steph. Pl. 335; 6 Encyc. Pl. & Pr. 828-1004, sub Bonnell: 185; Bristow: 135. See **DISMISSAL**; 2 Bouv. Dic. 510 (Practice); 14 Cyc. 387-465.

WORRINGTON v. WRIGHT, 115 U. S. 188. See Barnard: 108; Cutter: 308 (see this case cited in Clark, Conts.)

Installment contracts; a breach of one is a breach of all. Mersey Steel & Iron Co. v. Naylor, 9 H. L. App. Cas. 438, 18 Rul. Cas. 612; 23 *id*. 504; Withers v. Reynolds, 2 B. & Adol. 882 (E. C. L. R.), 36 R. R. 782; Rosk Island, 147 Ala. 581, 41 So. 806.

Mutual conditions; independent covenants. Boone v. Eyre, 2 H. Bl. 273, n.; 2 R. R. 768, 18 Rul. Cas. 609-620, ext. n. The entire contract is considered and it is construed from all its parts. 18 Rul. Cas. 618; Cutter: 308; cases.

NORTHERN Bk. v. PORTER TOWNSHIP, 110 U. S. 608, 615, S. P. Cohens: 244. Dicta of courts bind no person or thing. Opinions are construed from their records, like judgments of inferior courts. Windsor: 1. *Cited*, § 251, Hughes' Proc.

NOTITUR A SOCIIS: It is known from its associates. The meaning of a word may be ascertained by reference to the meaning of the words associated with it. Bro. Max. 588-593, 9 Cyc. 586; Cohens: 244; And. Dic., Sedgk. Stat. 220; End. Stat. 400. Kewaunee: 29; *In pari materia*; White v. Wagar: 130; *Falsa demonstratio*: 29 Cyc. 1065-1066.

Cited, §§ 169a, 189, 262, 269, 273, 275, Hughes' Proc.; § 287, Gr. & Rud.

Applied: 1 N. Y. 47, 69; 92 Va. 496, 44 L. R. A. 458; 71 N. Y. 486; St. Louis v. Howard (1893), 119 Mo. 41, 41 Am. St. 630, n. (a fragment must not be considered; the whole body must be viewed). *Contemporanea expositio*, etc.; Burks v. Bosso: 217a; C. v. Eastman, sub **OBSCENE MATTER**; Russ v. C., 210 Pa. St. 544, 105 Am. St. 825.

A holograph will was dated 1859. Manifestly it provided for certain living persons, for persons already born but who were born long after that date. From the ensemble it was held the date was in 1889. *Ut res magis valeat*; Rodriguez.

NOTARY: Liability of. Joost v. Craig, 131 Cal. 504, 82 Am. St. 374-388, ext. n.; 2 Bouv. Dic. 513. See John on Notaries. 29 Cyc. 1067-1109.

Protest of, as evidence. 3 Wigm. 1675.

NOTICE: Demanded upon the idea in *Audi alteram partem*. See *Id.*; Windsor:

Notice.—

1; Kewaunee: 29. §§ 56-60, 63-64, Hughes' Proc.; 29 Cyc. 1110-1128.
Certainty essential for. Rushton: 5; Bristow: 135. See 2 Bouv. 515; And. Dic.
Notice in practice; how given. 2 Bouv. Dic. When required. 2 Bouv.
Defenses; notice of; must be given from the record. J'Anson: 91; Gardner v. Buckbee; Garland: 60.
Essential in procedure and in sequestration proceedings. Audi alteram partem, Max. No. 1, §§ 51-57, Hughes' Proc. Facts, not conclusions, must be pleaded. See FACTS; CONCLUSIONS; 2 Bouv. Dic. 516.
Mandatory record must give notice of what will be tried. Garland: 60; Rushton: 5; Munday: 79; Starbuck: 263; Bloom: 266.
Frustra probatur, etc.; Quod ab initio, etc. Stability of notice from the record must be respected. Garland: 60; Rushton: 5; Starbuck: 263; Bristow: 135; Perry: 136a. See PLEADINGS; ISSUES.
Departures; there shall not be. See DEPARTURES; CONTINUITY. Expressio unius, etc. Res adjudicata.
Notice needed in assignment of contract. Ans. Conts. 222, 225. See ASSIGNMENTS; COMMERCIAL PAPER.
Right to, is implied. Oakley: 66; Windsor: 1; Audi alteram partem; Expressio eorum.
Alleging and denying of notice. Sto. Pl. 263, 805-809, 850-855. Notice to agent is notice to principal. Ross v. Houston; Le Neve: 396.
Attorneys are charged with notice of defects in proceedings. Galpin: 63. Notice to admit a fact. 2 Bouv. Dic. 518.
Notice to quit. 2 Bouv. 518-520.
Notice of intention to seek a review must be given by an exception noted. Bram v. U. S., sub ERROR; Montgomery: 292; Lough: 293. See NEW TRIAL.
Notice of all matter upon which a review is sought must be set forth in the assignment of error. Brown v. P.; Montgomery: 292; Lough: 293. Except non-waivable matter. Garland: 60; Montgomery: 292.
Defects in the mandatory record need not be excepted to or noticed. Windsor: 1; U. S. v. Cruikshank: 232; Campbell: 2.
Notice to produce documents. See PRODUCTION.
Possession of property; notice from. Williamson v. Brown.
May be waived. Thomas v. Citizens' Bank.
Summons may be waived by general appearance. See SUMMONS. Except by an infant. Galpin: 63.

NOVA CONSTITUTIO FUTURIS FORMAM imponere debet, non præteritis: A new enactment ought to impose form upon what is to come, not upon what is past. Bro. Max. 34-43, 8th ed; Calder: 237; Bronson: 238; Terry: 240; Dash: 237a. See *Ex post facto laws*; also 7 Johns. 503 et seq., where this rule is fully considered and the authorities reviewed. Is from the civil law, and is a part of the prescriptive constitution.

NOVATION. Tatlock v. Harris (1789), 3 T. R. (D. & E.), 174, 180, sub Birkmyr: 339; 2 Bouv. Dic. 520-523; And. Dic.; 29 Cyc. 1129-1140.

NUDA FACTIO OBLIGATIONEM NON parit: A naked promise does not create an obligation. Dig. 2, 14, 7, 4; Code, 4, 65, 27; Bro. Max. *Ex nudo pacto, etc.*; Bainbridge: 332. *Nuda ratio et nuda pactio non ligant aliquem debitorem:* Naked reason and naked promise do not bind any debtor. Fleta, 1, 2, c. 60, § 25; *Nudum pactum.* Meaning of. Ans.

Nuda Pactio.—

Conts. 65. See CONSIDERATION. *Nudum pactum.* Meaning of. Ans. Conts. 65. See CONSIDERATION. *Nudum pactum est ubi nulla subest causa propter conventionem; sed ubi sub est causa, fit obligatio, et parit actionem:* *Nudum pactum* is where there is no consideration, for the undertaking or agreement; but when there is a consideration, an obligation is created and an action arises. Dig. 2, 14, 7, 4; Bro. Max.; 1 Fonblanque, Eq. 5th ed. 335a. *Ex nudo pacto, etc.* *Nudum pactum ex quo non oritur actio:* *Nudum pactum* is that upon which no action arises. Code, 2, 3, 10; 5, 14, 1; Bro. Max.; Bart. Max. 231. *Ex nudo pacto, etc.*; Rann v. Hughes: 312.

NUDD V. THOMPSON (1867), 34 Cal. 39, 191. Denials; sufficiency of. Doll; Poor: 37.

NUDITY. As an element of indecent exhibitions. McClain, C. L. 1137, 1157.

NUISANCE: Abatement of. Rose v. Miles, Tiede. Pol. Power; Rhymor, 206 Pa. 230, 98 Am. St. 777, n. (private person must suffer special injury). Meeker v. Van Rensselaer (1836), 15 Wend. 397; stated, Wood, Nuis., Bish. C. L. Dill. Mun. Corp.; Thomas, 39 W. Va. 526, 26 L. R. A. 727-733 (health boards; powers of. Miller v. Horton: cases); Fertilizing Co.; Dill. Corp.; Evansville; 80 Am. St. 212-221. *Alcohol; right to destroy.* Miller v. Horton: cases; Fisher v. McGirr. *Notice essential for.* 80 Am. St. 217-221. 2 Gr. Ev. 465-476, 3 Gr. Ev. 184-187, 3 Bish. Cr. Proc. 861-898, 3 Suth. Dam. 1035-1060; Wood on Nuisance; 2 Bouv. 524-526; And. Dic. See POLICE POWER; 29 Cyc. 1143-1290.

City liable for, when. Mansfield, 76 O. 270, 118 Am. St. 852-884, ext. n.

As a crime. McClain, C. L. 1136-1157. What constitutes. 9 Am. Cr. R. 416, n. (public swearing on street). P. v. Cunningham.

Public; what are. Acme, 34 Ind. Ap. 346, 107 Am. St. 190-252, ext. n.

Liability of property owner for nuisance he did not create; grantor; grantee; landlord and tenant. Leahan, 178 Mass. 566, 86 Am. St. 506-523, ext. n.; Todd; Shipley. See PRIVACY; *In jure*; Griffin, 92 Am. St. 496-559, ext. n., sub Winterbottom.

Successive suits for injuries to real estate by. Church of Holy Communion, 66 N. J. 218, 55 L. R. A. 81; cases.

Statutory authority to commit will not be presumed. Missouri R. R., 98 Tex. 91, 70 L. R. A. 579-597, ext. n.

Prescriptive right to maintain a public nuisance. Leahan, *supra*.

Notice to purchaser is not necessary to render him liable. Lincoln (City of) v. First Natl. Bank (1903), 67 Neb. 401, 60 L. R. A. 923, n.; Cambell v. Seaman (1876), 63 N. Y. 568; Erwin, Cas. Torts, 517 (what constitutes): St. Helen's Smelting Co. v. Tipping; Fletcher v. Rylands.

NULLA FACTIO NE EFFICI POTEST ne dolus præstetur: By no agreement can it be effected that there shall be no accountability for fraud. Dig. 2, 14, 27, 3; Bro. Max.; *Pacta privatorum, etc.* Illegality, fraud, cannot be contracted for. Cited, Harper: 218; Hollister v. Nowlen; *Jus publicum privatorum, etc.*; Nullus commodum capere, etc.

Cited, § 18, Hughes, Conts.; §§ 300, 304, Hughes' Proc.; §§ 71, 292, Gr. & Rud.

NULLI VENDEMUS, NULLI NEGABIMUS, aut differemus rectum, aut justitiam.

Nulli Vendemus.—

clam: To none will we sell, to none will we deny or delay right or justice. This is a clause from Magna Charta. Harrigan, *sub* MAGN. See observations *sub* Waco: 300. This is a part of the prescriptive constitution.

The decisions from many jurisdictions show that the above provision is grossly disregarded. It is a guaranty that is implied, if not expressed. However, most constitutions reaffirm it. But the fact is, that in the administration of affairs it is ignored. In some states judicial action is delayed from two to four years for decades in and out. Delayed justice is often a denial of justice. It is a disorder in government of which executives and legislatures should take notice.

NULLUM TEMPUS OCCURRIT REGI:

Lapse of time does not bar the right of the crown. Bro. Max. 65-67, Bish. Stat. Crimes, 103; 68 L. R. A. 272; Gibson, 13 Wall. 92, 20 L. ed. 534, n.; 13 Am. Law Reg. 465-471, 13 Am. & Eng. Encyc. Law. 711; 3 Wash. R. P. 159; Burgess, 16 How. 48, 65; Sedg. Stat. 84; *Baskerville's Case* (1585), 7 Co. Rep. 28a, 8 Rul. Cas. 171; cases: *Roe d. Johnson v. Ireland* (1809), 11 East, 280, 10 R. R. 604, 8 Rul. Cas. 171-180, n.; cases; *McPhail v. P.* (1896), 160 Ill. 77, 52 Am. St. 306, n.; *Ash's Estate* (1902), 202 Pa. 422, 90 Am. St. 658, n.

Cited, Hughes, *Conts.*; §§ 64, 65, 297, Gr. & Rud.

Limitations; statutes of; sovereignty is not barred by the statute of limitations. Fink v. O'Neil (1882), 106 U. S. 272; County of St. Charles v. Powell (1856), 22 Mo. 525, 66 Am. Dec. 637-639, n., 2 Pars. N. 693, 36 Am. St. 565, 1 Dill. Corp. 668, 674; *Vigilantibus et non dormientibus*. But this does not apply to counties and other municipal corporations. *May v. School District* (1887), 22 Neb. 205, 3 Am. St. 266, n.; Brown, 224 Ill. 184, 115 Am. St. 146; 101 Am. St. 144; 2 Dill. Corp. 667-675, 3 Rand. Com. Paper, 1601; Bedford, 133 Ind. 562, 36 Am. Stat. 563, n.; *sub* *Perry v. Worcester*; S. v. School District (1890), 30 Neb. 520, 27 Am. St. 420, n.; 68 L. R. A. 273.

Roy n'est lie per aucun statute, si il ne soit expressement nosme: The king is not bound by any statute, if he be not expressly named to be so bound. Bro. Max. 72; Barron: 241; Bish. Stat. Crimes, 103.

Public nuisance cannot be legalized by lapse of time. St. Helen's Smelting Co.; Brady v. Weeks, Shear. & Redf. Neg. 380; F. v. Cunningham.

Encroachments on a public street or highway will not ripen into title. Yates v. Town of Warrenton (1888), 84 Va. 837, 10 Am. St. 860; C. v. Moorehead (1888), 118 Pa. 344, 4 Am. St. 599, 26 L. R. A. 461, n. (abandonment of highway); Elliott, Roads, 883.

A cause of action is immortal, at common law. See LIMITATIONS.

Counties and towns; doctrine and maxim does not apply to. See Elliott, Roads, 883. Nor to foreign governments. 101 Am. St. 140-188, n. See French Republic v. Saratoga Co. (1903), 191 U. S. 427 (query).

NULLUM TEMPUS OCCURRIT REI-

publica: Lapse of time does not bar the commonwealth. 11 Grat. (Va.) 572; Hill,

Nullum Tempus.—

R. P. 173; 8 Tex. 410; 16 id. 305; 5 McLean, 133; 19 Mo. 667. See *Terre Haute R. R. v. S.*; reversed in 194 U. S. 576 (state lost a vast sum by its laches).

NULLUS COMMODOUM CAFERE POTEST DE INJURIA SUA PROPRIA: No one shall take advantage of his own wrong. Bro. Max. 279-300; Hochster: 308b; Peck v. U. S.; Pickard; Horn v. Cole; Wonderly: 102; Graver: 103; Borden: 267; Swift; Le Neve: 396; Lickbarrow: 394; Hitchcock v. Galveston; Dimes: 176; Riggs; Angle v. Chicago R. R.; Jewett; Bright; Bull; Martin v. Porter; Twyne's Case; Lester: 341; Pearsall; Dash: 237a; Squib Case; *Qui primum peccat ille facit rixam; Nul prendra*, etc.; Coke, Litt. 148b. See Goddard, Easements (Bennett's ed.), 443; *ELECTION OF REMEDIES*; Cutter: 308; Master v. Miller.

Cited, §§ 87, 149, 174, 315, Hughes' Proc.; §§ 46, 55, 70, 174, 271, 292, Gr. & Rud.

What cannot be done directly cannot be done indirectly. Quando aliquid prohibetur, etc. Bull. One cannot indirectly violate an injunction. See INJUNCTION; 87 Am. St. 49.

Contracts: one cannot break and sue upon. Cutter: 308; Royce (eviction). One cannot provoke a quarrel and then make full self-defense. *Qui primum peccat.*

A judgment secured by perjury will be set aside. Barr: 265; Graver: 103. See *Ex dolo malo*; Needham: 261.

A man is not permitted to charge the consequences of his own fault to others, and complain of that which he himself brought about. Swan; City Nat. Bank v. Kusworm. *Non debet alteri per alterum iniqua conditio inferri.*

One cannot invite or induce error and then assign it as a ground of review. Consensus tollit errorem. L.C. 290a-299; § 53; CONVENIENCE, Gr. & Rud.

One breaking a contract can no longer enforce any of its stipulations. See Norrington; Cutter: 308; BREACH.

An assured person dying from a criminal operation, or from execution for crime cannot recover. Burt v. Ins. Co., 187 U. S. 362.

"Real party in interest" is an essential party. One wrongfully holding commercial paper cannot recover upon it; one has no right before a court, by his own wrong; he is not a real party in interest; this may be pleaded against him. City Bank v. Perkins (1864), 29 N. Y. 554, 86 Am. Dec. 332. See PARTIES.

One can establish no right founded upon a wrong. Sasportas v. Jennings; Br'll v. Griswold; Taylor v. Cole. Corruption of voters by the claimant of an office vitiates his right to it. S. v. Purdy (1874), 36 Wis. 213, 17 Am. Rep. 485-494, Laws. Lead. Crim. Cas. Simp. 107. An irregular judgment reversed gives no rights or protection to a party to it. Young v. Bircher (1860), 31 Mo. 136, 77 Am. Dec. 638, n. The president of a corporation practicing a fraud which inures to his personal advantage is liable personally therefor. Tyler v. Savage (1892), 143 U. S. 79, 36 L. ed. 82. A wrongdoer is liable as a trustee *ex maleficio* for property gained by fraud. Angle v. R. R. The receiver of benefits obtained by fraud is liable over, to injured party. Fennimore v. U. S. (1797), 3 Dall. (Pa.) 357, 1 L. ed. 634, n.; *sub* Swift v. Tyson; Angle v. R. R., ante.

One cannot acquire land by fraud and retain it against heirs. Piper v. Hoard

Nullus Commodum.—

(1887), 107 N. Y. 73, 1 Am. St. 789 (instructive case).

One preventing performance of a contract for which an entire sum is to be paid becomes liable for its payment at once. Frost: 308a; Hochster: 308b; see BREACH OF CONTRACT: cases. So an attorney may recover a fee as if he had made full performance. Bartlett, 79 Cal. 218, 12 Am. St. 139, n.; Hitchcock.

One making the performance of a contract impossible is liable for damages. Woodberry, 53 Ark. 488, Huff. & W. Conts. 574; Peck v. U. S.; 2 Beach, Conts. 1733. See *Lex non cogit ad impossibilia*.

One must come into court with clean hands. Collins; Cutter: 308. One cannot be given aid if he is in the wrong. Armory: 180; Klug, 129 Wis. 468, 7 L. R. A. (N. S.) 362-367 (painter misusing photograph gains no rights); *In pari*.

The murderer of a devisor or ancestor can take nothing as heir. Riggs v. Palmer; Tiede, Real Prop.; Schellenberger v. Ransom, *supra*. A passenger colluding with a conductor for passage in violation of regulations, is guilty of fraud and cannot claim the rights of a passenger. McVeety v. St. Paul, etc. R. R. (1891), 45 Minn. 266, 11 L. R. A. 174, n., 22 Am. St. 728. Beneficiary killing assured. Holdom v. Ancient Order, etc. (1895), 159 Ill. 619, 31 L. R. A. 67, n.; New York Life Ins. Co. v. Davis (1899), 96 Va. 737, 44 L. R. A. 305, n.

One cannot wrongfully acquire possessions and hold them against the injured party. 1 Pom. Eq. § 155; Angle v. Chi. R. R. One cannot continue a lien by wrong. Kortright.

A corporation cannot set up its own default in defense of its contracts, *e. g.* a foreign corporation, failing to comply with state laws. Phoenix Ins. Co., 134 Ind. 215, 20 L. R. A. 405-411. Nor accept and retain benefits and refuse to pay for them. Hitchcock; *Ultra vires*.

Nemo allegans suam turpitudinem audiendus est. No right can be founded on the allegation of a wrong in which the complainant avowedly participated. Note, Collins v. Blanton, 1 Sm. Lead. Cas. 699-701, 7th ed.; *id.* 749, 752, 8th ed.

A trespasser can take no benefits from his trespass. Bull. Else, practically, a contract would exist against one's consent. See Bartholomew: 302; Mills: 31: cases. One cannot contract for immunity for his own fraud or wilful wrongs. Hollister. *Nulla pactione efficit, etc.; Pactis privatorum juri publico non derogatur.* § 18, Hughes' Conts.

Preventing one from defending himself. Valden v. C.; C. v. Selfridge. Self-defense; slayer must not provoke necessity. C. v. Selfridge.

One obtaining instruments of evidence illegally may nevertheless introduce them. Adams v. New York; 1 Gr. Ev. 254. See *Ilsley v. Nemo tenetur, etc.*

One undertaking to keep books of account and failing has every presumption against him. *Omnia presumuntur contra spoliatores.*

One cannot gain a contract status by making a sham offer; he must offer bona fide. Payne: 307, Gulick: 364. See BONA FIDES.

Concealment renders marine insurance void and a landlord liable for injuries caused by premises. See MALICIOUS ACTS; WARRANTY; L. C. 380-384; Carter v. Boehm.

Nullus Commodum.—

This maxim is profoundly fundamental and is one of the prescriptive constitution. For its operation statutes yield.

NULLUS VIDETUR DOLO FACERE qui suo jure utitur: No man is to be esteemed a wrong-doer who avails himself of his legal right. Dig. 50, 17, 55; Bro. Max.; Mahan; McCardle; U. P. R. R. v. Capper.

NULLIUS IN TERRA REGNO. Pleas of Starbuck: 243; And. Dic. (Record).

NUNQUAM RES HUMANÆ PROSPERE SUCCEEDUNT ubi negliguntur divinae: Human things never prosper when divine things are neglected. Co. Litt. 95; Wingate, Max. 2. See CHRISTIANITY; Trist: 214: cases.

Juris præcepta, etc. expresses the lawyer's Golden Rule. Jurisprudence contributes profoundly moral principles. These are grounds and rudiments of law; these expand or contract all other laws, even constitutions.

In New York the constitution yields to a fundamental principle, *i. e.*, no man can be judge of his own cause. This is a part of *Idem agens et patiens esse non potest*. The supreme court of Missouri set this above constitutions and statutes. *S. ex rel. Henson v. Sheppard*.

From these cases the rule may be deduced and expressed thus: *Where the Divinity is neglected human affairs suffer.* Plainly jurists recognize that moral laws must not be offended.

The crown—state—sovereignty—is a party in all human affairs or transactions, at least this far, that no executory part will be considered or enforced if tainted with illegality. The rule applied to illegality of contract is *In pari delicto*; or in equity, *"One must come into court with clean hands,"* or *"He who has done iniquity shall not have equity."* Collins v. Blanton; *Nullus commodum*. Therefore, as to illegal compacts, if executory, the state in effect says, *Non hæc in fœdera veni; Pacta dant legem contractui* (Agreements give the law to the contract).

The state did not create courts to entertain causes tainted with illegality, therefore the rule is, *jurisdiction will not attach to illegality. Res inter alios.*

Consent will not confer upon a court jurisdiction of forbidden matters. Dimes: 176; Weltmer: 268a; Beaumont: 367.

Moral laws are a part of the prescriptive constitution; these are silent factors interpreted into all compacts. *Expressio eorum;* Church.

The strict constructionists say that the only limitation of legislative power is the word or words the finger can be placed upon in constitutions. Brown v. Tharpe; Rison: 253; Blair: 254. See CONSTITUTIONAL LAW. "This is an old argument oft repeated but never assented to." South Carolina v. U. S.; *In præsentia majoris*.

Writing and teaching the law in disregard of conclusions deducible from the foregoing observations mislead and bewilder. *Lex non exacte; Melius petere.*

If moral laws lie at the base of jurisprudence, this fact should be expressly and plainly taught. If the lawyer's Golden Rule is the same as the theologian's the

Nunquam Res.—

jurisprudent should know it. If fundamental precepts of jurisprudence are only separated from those of morality by verbalty, this should be plainly taught and thoroughly impressed, and certainly not obscured nor denied, as it is by many courts.

When the philosophy of the law is lost the law is lost.

OAKLEY v. ASPINWALL, 3 N. Y. (Concordare leges legibus): L.C. 222.

OAKLEY v. ASPINWALL, 4 N. Y. (Audi alteram partem: Notice is implied): L.C. 68.

OATH: Essential in the administration of justice. Omichund. Is an act of religion. *Jurare*, etc.; *Jusjurandi forma verbis differt*, etc.; *Sacramentum habet*, etc.; 2 Bouv. Dic. 529. See CHRISTIANITY. What sufficient in perjury. McClain, C. L. 854-857; 29 Cyc. 1296-1306.

OBEDIENTIA EST LEGIS ESSENTIA: Obedience is the essence of the law. 11 Coke, 100. And for this the law should be moral, reasonable and certain. He who violates the law can take nothing under it. Armory: 180.

OBLIGATION: Ans. Conts. 4, 5, 7, 32; Fletcher v. Peck; Brown v. Collins; Carter v. Towne. See PREFACE, Hughes' Conts.; 2 Bouv. Dic. 532-536. *Distinguished from duty*. Ans. Conts. 6, 210. Sources of obligation. Ans. Conts. 7. Limits of, when arising from agreement. *Id.* 208, 304. Impairment of. Bronson: 238; Fletcher v. Peck; Dartmouth. *Obligation of government*. § 20, Hughes' Conts.; Oakley.

OBSCENE MATTER: If material, must be set forth. R. v. Bradlaugh, 3 Am. Crim. Rep. (Hawley) 464, 470. See Rosen: 92; *Necessitas*, etc.

Indecent publication: what is. P. v. Eastman, 188 N. Y. 478, 65 Cent. L. J. 64-69, n. OBSCENITY, 23 Cyc. 1314-1324.

OBSTRUCTING JUSTICE: 29 Cyc. 1325-1339.

O'CONNELL v. REED: L.C. 224.

ODIOSA NON PRESUMUNTUR: Odious things are not presumed. Evil is never presumed. See CHRISTIANITY; *Malum*.

OFFER AND ACCEPTANCE: See Cooke: 321; Adams: 326; Jordan: 324; Ans. Conts. 14-35, 335, 366; White v. Corlies: 303; 1 Page, Conts. 22-54; 9 Cyc. 247; Whart. Conts. 1-28; Smith, 158-164. See ACCEPTANCE.

Law of. See §§ 44-50, Hughes' Conts.; Cooke: 321. *Contracts by letter*; telegrams. See § 46, Hughes' Conts.; Adams: 326.

Negotiations for a contract insufficient. There must be an offer, also an acceptance. Cherokee, 143 N. C. 376, 118 Am. St. 806; White: 303. See ASSENT.

Acceptance of deeds. Welborn: 388. Offer of compromise. 2 Bouv. Dic. 640 (payment into court). See DELIVERY.

OFFICE: Nature of. Patton v. Board (1889), 127 Cal. 388, 78 Am. St. 66, n. Sale of. Ans. Conts. 183. See Greenh. Pub. Pol. Loss of one office by accepting another. Att'y General v. Oakman (1901), 126 Mich. 717, 86 Am. St. 574-591, ext. n.

OFFICER: De facto officer. Acts of: validity as to third persons. Cleveland v. McCanna (1898), 7 N. Dak. 465, 66 Am. St. 670, n.; 41 L. R. A. 852; Shelby v. Alcorn (1858), 36 Miss. 273, 72 Am. Dec. 169-189, ext. n., Whart. Conts. 132; cited, Mech. Pub. Off., Beach, Pub. Corp.: McCormick, 98 Wis. 522, 67 Am. St. 827,

Officer.—

n.; Throop on Pub. Off. 622-668; Oliver v. Mayor, etc. (1899), 63 N. J. L. 634, 76 Am. St. 223, n. Acts of officers cannot be collaterally attacked. Cleveland, *supra*; Corum (1900), 62 Kan. 261, 84 Am. St. 382, n.

Deputies; *torts of*; *liability of officer for*. Brown, 76 Miss. 7, 71 Am. St. 512-522, ext. n. (sheriff liable for deputy shooting a person to arrest him). Regular process essential to protect. Savacool: 164: cases. Whether, and when, the sureties on an official bond may escape liability on the ground that their principal was a trespasser. *Virtute officii* and *Colore officii* discussed. S. v. Timmons (1899), 90 Md. 10, 78 Am. St. 417-442, ext. n.; 48 Am. Dec. 509-517; 6 Am. St. 130-133; 71 Am. St. 519-522.

When an official bond becomes binding on sureties, and what irregularities will fail to relieve them. Ramsay v. P. (1902), 197 Ill. 572, 90 Am. St. 177-206, ext. n. *Sale of office illegal*. White v. Cook (1902), 51 W. Va. 201, 41 S. E. 410, 90 Am. St. 775, n. *In pari delicto*, etc. *Misconduct of*; *what acts are criminal*. McClain, C. L. 904-919.

Immunity of judicial officers. Lange: 159; Spaulding v. Vilas.

Liability for acts of nonfeasance and misfeasance. Bartlett: 6; Worden v. Witt (1895), 4 Idaho, 404, 95 Am. St. 70-134, ext. n.

His right to arrest. 4 Am. Cr. R. 36. When killing of is manslaughter. *Id.* 36. See ARREST; Allen: 167.

Extortion by. 9 Am. Cr. R. 297. See EXTORTION. *Cannot assign salary*. Dickinson.

Incompatible offices; *what are*. S. v. Jones, 130 Wis. 572, 118 Am. St. 1042.

Generally: 2 Bouv. 540-544; And. Dic., 29 Cyc. 1356-1472.

OGDEN v. SAUNDERS (1827), 12 Wheat. 358, Marsh. Const. Dec. 549-585. See Gibbons. Rights, remedies and obligations defined.

OHIO. The code has been construed as badly in this state as it has been in Missouri. From decisions and texts in that state variances and departures are recognized. The general demurrer can be waived; for evidence can be received outside of the pleadings, and if without objection, such evidence will be considered. Where allegations are not made to correspond, there pleadings do not limit issues and confine evidence; there jurisdiction to receive evidence is not derived from the pleadings; there are departures. See Sto. Pl. 10; *Frustra probatur quod probatum non relevat*. Some of the decisions require one of the tests of *res adjudicata*, for they hold there must be an identity of the thing alleged and of the thing proved. Others hold that this requirement for *res adjudicata* may be waived. The attempt to reconcile the decisions of Ohio shows there is hopeless conflict. Fundamentals are not understood. See 1 Bates Pl., Prac., Parties and Forms 511, 512 (1908); VARIANCE; CODE; LITERATURE.

OKIE v. SPENCER, sub Abel; 334; Rees: 334a.

Effect of giving note or check for antecedent debt. Dayton.

OLEOMARGARINE: Manufacture of, may be prohibited. See CONSTITUTIONAL

Oleomargarine.—

LAW: POLICE POWER; Millet v. P.; And. Dic. 731.

OLIVE v. S. (Judicial notice; Lanfear: 181. *De non apparentibus*, etc.): L.C. 182.

OMICHUND (or Omychund) v. Barker (1744), 1 Atk. 21, 2 Eq. Cas. Abr. 397, 26 Eng. Reprint, 15, 22 *id.* 339, 1 Wils. 84, n.; 2 Harg. Co. Litt. 6b, 1 Wills, Rep. 538, 1 Sm. Lead. Cas. 1351-1378; omitted in 8th ed.; Thayer, Cas. Ev. 1081, 11 Rul. Cas. 126, n.; 3 Wigm. 1874.

Competency of witnesses; what religious belief requisite. Omichund; S. v. Washington (1897), 49 La. Ann. 1602, 42 L. R. A. 553-568, ext. n. (law of the states). See OATH.

OMNE MAJUS CONTINET IN SE MINUS: The greater contains in itself the less. Bro. Max. 173-177; Kraner: 299; Finch; Batty v. Carswell; Story, Ag. 172; Suth. Stat. 320. Lesser laws yield to greater. *In presentia majoris*, etc.; Ransom: 122. See CONSERVING PRINCIPLES.

Max. No. 34, §§ 320-322; cited, §§ 19, 214a, 238, 321, 322, Hughes' Proc.; §§ 67, 152, Gr. & Rud.

When a broad allegation contains a lesser. Dobson: 232a; Dovaston: 217. See CONCLUSIONS OF LAW.

A decision decides not only the point expressed, but all others necessarily involved in reaching the conclusion expressed. Suth. Stat. 320. *Res adjudicata*.

Offering a reward to the public is an offer to each individual. Williams: 322. Representations to the public also, *e. g.*, a railroad time table. Denton; LeBlanche. Also in case of deceit. Notes, Chandelor, Sm. L. C. 296, 8th ed.; Scott v. Dixon, 29 L. J. Exch., note 3.

OMNIA PRÆSUMUNTUR CONTRA spoliatores: All things are presumed against a wrongdoer. Bro. Max. 938-943, 8th ed.; Armory: 180; Dimond, 47 Wils. 172. One charged with keeping books of account and failing has every presumption against him. *Nullus commodum capere, etc.* Master v. Miller (alterations); Rice v. Travis.

Max. No. 33, §§ 316-319. Cited, p. 42, Hughes' Proc.; §§ 67, 252, Gr. & Rud. *Presumption.* Orser v. Storms (1826), 9 Cow. 687, 18 Am. Dec. 543-560, ext. n.; Hay v. Peterson (1896), 6 Wyo. 419, 34 L. R. A. 581-593, 1 Tay. Ev. 97-103, 2 Best, Ev. 11-13.

One should produce the best evidence possible. Blatch v. Archer (1774), Cowp. 63; Runkle v. Burnham (1894), 153 U. S. 216, 38 L. R. A. 694; Iverslie: 46.

OMNIA PRÆSUMUNTUR RITE ET solemniter esse acta: All things are presumed to have been rightly and regularly done. Bro. Max.; Crepps: 113; Rice v. Travis; 61 Cent. L. J. 441; 63 *id.* 137; Galpin: 64; C. v. Kane: 183; Hahn v. Kelly; 2 Bouv. Dic. 59 (jurisdiction); Ell. App. Proc. 709-725; 2 Wh. Ev. 1297-1330; Sto. Pl. 782; 1 Bailey, Jurisdic. 121-135. See JUDICIAL NOTICE; *De non apparentibus*; Harrow; 1 Gr. Ev. 34. S. P. Armory: 180; And. Dic. (Spoliator); 81 Am. St. 535-562; 9 Cyc. 759; 29 Cyc. 1480-1482.

Max. No. 6, §§ 110-119; cited, pp. 6, 15, 16, 2, §§ 8, 9, 12, 23, 72, 73, 85, 104, 110, 111, 112, 113, 115, 117, 119, 170, 171, 205, 209, 218, 222, 246, 281, Hughes' Proc.

Cited, §§ 53, 104, 108, 125, 149, 287, 205, Gr. & Rud.

Omnia Præsumuntur Rite.—

Officers are presumed to do their duty. S. v. Main (1897), 69 Conn. 123, 61 Am. St. 30, n.

Strict jurisdictional facts not supplied by presumption with favor. Bloom: 266; Hannah: 128; Crepps: 113. They must affirmatively appear. Clem: 2c; Crepps: 113; Piper: 114; cases; Iverslie: 46. See RECORD; Ell. App. Proc. 717. From judicial findings it will be presumed that there was sufficient evidence to support them. Armstrong v. Fernandez, 208 U. S. 324.

Burden of proof shifts if a defect is pointed out. Note, 28 Am. St. 21. Continuity of regularity essential for the presumption.

Inferior tribunals; application of this maxim. Kempe's Lessee: 115. Proceedings contrary to course of common law. Galpin: 64; 81 Am. St. 535-563 (probate courts). The application or withholding of this maxim is the chief distinction between superior and inferior courts. See RECORD. The mandatory record and all parts of it must affirmatively appear; for no part of it can be aided by presumptions of regularity. Arrano v. P. (1897), 24 Colo. 233; 1 Bish. Crim. Proc. 1347. It is presumed that an officer could not find personality to levy upon, before he levied upon land. Murray: 219; Russell, 176 N. Y. 178, 68 N. Y. 252, 98 Am. St. 656, n. (presumption as to reading an application); Mackin v. P. (1885), 115 Ill. 312, 6 Am. Cr. R. 556 (as to finding an indictment).

Whether a proceeding was a sufficient foundation to protect it from collateral attack often depends on the maxim, *Omnia præsumuntur rite*. Harrow v. Grogan; Hahn v. Kelly. The distinction between and the force and effect of the judgments of domestic, of sister state, of foreign and of inferior statutory tribunals well indicates the importance of the presumption of regularity. Upon this rule substantive right often depends; that presumption often measures the possibility of recovering or establishing a right. There are many substantial rights that would fall without it. Whatever attracts it is greatly aided and advanced; otherwise they would be greatly impeded or weakened. That to which it applies "is a courier without baggage." Every presumption which a subject-matter attracts is of much consequence in pleading and proving it. This is particularly true of a deed, also of commercial paper. *Probatis extremis præsumuntur media*; Bray v. Adams.

Presumptions of regularity; of proceedings before inferior and statutory boards are greatly limited. See Crepps: 113; Piper: 114; cases; Heck, 75 Tex. 460, 16 Am. St. 915, n. (liberal rule); John v. S. (1885), 104 Ind. 557, stated, 6 Am. Cr. Rep. 569 (presumed that a plea of not guilty was entered in a justice's court); Leonard, 117 Mo. 117; Bowman, 102 Ill. 472; Tucker, 130 Ind. 514. Allegation that one contracted in writing carries the presumption that he signed it. Sto. Pl. 253; Dobson: 232a.

This maxim involves a rule of great consequence, which should be understood for each state. It is much observed by confusing discussion and erratic and singular decisions. Notes, Crepps: 113; Hahn

Omnia Praesumuntur Rite.—

v. Kelly; Clem: 2c. It should be considered with *De non apparentibus*. See CODES; CONSTRUCTION.

Legal presumptions do not come to the aid of a record except as to acts or facts as to which the record is silent. See *Harrow v. Grogan* (Ill.). When the record is silent as to what was done, it will be presumed that what should have been done was done and done rightly; but where the record states what was done, it will not be presumed that something different was done. *Hahn v. Kelly*; *Providence*, 26 R. I. 73, 106 Am. St. 682, n.

Foreign judgments viewed as domestic. *Roberts*, 39 Ind. App. 577, 64 Cent. Law Jour. (1907).

From the mere record entry of an insolvent's discharge all necessary facts to support the charge will be presumed. *Shuts v. Hawk* (1826), 14 S. & R. 173, 16 Am. Dec. 486. See *Fischil*, sub *RES ADJUDICATA*; *Dobson*: 232a.

OMNIS INNOVATIO PLUS NOVITATE

perturbat quam utilitate prodest: Every innovation disturbs more by its novelty than it benefits by its utility. *Bro. Max*. 147-152; *Truxton*; *Martin*: 246. *Legis fidei*, etc.; *Minime mutanda*, etc.

OMNIS RATIO HABITIO RETROTRAHITUR

et mandato equiparatur: A subsequent ratification has a retrospective effect, and is equivalent to a prior command. *Co. Litt.* 207a; *Bro. Max*. 866-877; notes to *Armory*, *Sm. L. C.* 360-368; *Sm. Conts.* 202, *Huff*, *Tiff.* and *Reinh.*, *Ag. Mech.* 167, 110-182; 2 *Herm. Estop.* 1060; 1 *Chit. Conts.* 23, 290-296; 1 *Add.* 12, 51, 60; 13 *L. R. A.* 221; *Fleckner*, 8 *Wheat.*; *Culver v. Ashley* (1837), 19 *Pick.* 300, 1 *Am. Lead. Cas.* 714 (one retaining benefits of a transaction is held to have adopted it); *McClure* (1839), *Rice's Law* (S. C.), 215, 33 *Am. Dec.* 105, 1 *Am. Lead. Cas.* 667; *Whart. Ag.* 61-92, *Ans. Conts.* 336-338, *Bish.* 843, 879, 2 *Kent*, 615, 616, *Sto. Ag.* 239, 260; *Dash*: 237a; *Smith v. Hodson*, sub *ELECTION*; *Fitzsimmons*: 384; *Hilberry v. Hatton*, sub *Bentley*; *Hitchcock*; *Salt Lake*; *Gainey v. Miller* (1883), 111 *U. S.* 395. §§ 169a, 306, 311, *Hughes' Proc.*; § 301, *Gr. & Rud.*; 29 *Cyc.* 1483.

Ratification. One cannot ratify a part and reject the residue. *Gainey v. Miller*; *King v. Mason* (1860), 42 *Ill.* 223, 89 *Am. Dec.* 426; *Taylor v. Conner* (1868), 41 *Miss.* 722, 97 *Am. Dec.* 419; *Morehouse v. Northrop* (1866), 33 *Conn.* 380, 89 *Am. Dec.* 211; *Qui sentit*, etc. Intention essential with full knowledge; it is like an election. *Dash*: 237a; *Persons*, 5 *Ind.* 261, 61 *Am. Dec.* 85, n.; *Yellow J. Sil. Min. Co.*, 5 *Nev.* 224, *Blanch. & W. L. C. Mines*, etc., 406, 3 *Mor. Min. Rep.* 545; *Mech. Ag.* 128; cases; *Whart. Ag.* 65, 2 *Kent*, 615, 616; *Backman*, 27 *Vt.* 187, 65 *Am. Dec.* 187, n.; *Gulick v. Grover* (1868), 33 *N. J. L.* 463, 97 *Am. Dec.* 728; *Errickson*, 44 *Neb.* 622, 48 *Am. St.* 753, n.; 28 *L. R. A.* 577 (ratification or estoppel must be pleaded); *Hefner*, 63 *Ill.* 403, 14 *Am. Rep.* 123 (forged instrument may be ratified). *Contra*: *Owsley*, 78 *Ky.* 517, 39 *Am. Rep.* 258, n.; *Holbrook*, 116 *Mass.* 155, 17 *Am. Rep.* 146 (deed may be ratified in parol or by acts *in pais*); *Palne v. Tucker* (1842), 21 *Me.* 138, 38 *Am. Dec.* 255, n.; *Ingraham*, 64 *Ill.* 526, 528.

Omnia Ratihabitio.—

See *McCracken*, 16 *Cal.* 591, *Mech. Cas.* *Ag.* 109.

Contracts induced by duress may be ratified. *Whart. Conts.* 154. Ratification of a contract by those *non compos mentis* may be shown inductively. *Whart. Conts.* 120; *Res ipsa loquitur*.

Void contract cannot be ratified; it can only be validated upon a new consideration. *Pritchett*, 26 *Ind. Ap.* 56, 84 *Am. St.* 274, n. *Quod ab initio*, etc.

Forgery. The crime cannot be condoned. *Mech. Ag.* 116; *Henry*, etc., *Ass'n*, 181 *Pa.* 201, 59 *Am. St.* 636 (contracts that cannot be ratified); *Whart. Ag.* 71. Criminal acts; ratification of. *Henry*, 114 *Ind.* 276, 5 *Am. St.* 613-621, ext. n. Liability of person whose signature is forged on commercial paper. *Traders' Bank v. Rogers* (1897), 167 *Mass.* 315, 36 *L. R. A.* 539-544, ext. n.

Void and voidable contracts; ratification of. *Bish. Conts.* 610-621, *Ans. Conts.* 204-206; *Negley v. Lindsay* (1871), 67 *Pa.* 217, 5 *Am. Rep.* 427; *Newell*, 11 *Sm. & Marsh* (Miss.), 49 *Am. Dec.* 66; *Boutelle*, 19 *N. H.* 196, 49 *Am. Dec.* 152.

Statutes often provide that a certain transaction is void, e. g., that a sale under the Statute of Frauds is void unless a memorandum is made. But such transactions are held voidable only, and not void. *Ad ea quae frequentius*, etc.

On principle, it seems all transactions are voidable, except those involving public policy and usurpation and abuse of power. *Sto. Pl.* 10; *Van Fleet*, *Coll. Att.* 16; *Rushton*: 5.

Coram non judge proceedings cannot be ratified. See id. What one could not originally have authorized, he cannot subsequently adopt. Reason is the soul of the law. *Quod ab initio*, etc.

Infants; ratification by. *Craig*; *Tobey*, 123 *Mass.* 88, 25 *Am. Rep.* 27-32.

Acting on appearances. A principal who permits an unauthorized agent to act for him and who stands by without interference while third persons deal with such agent, cannot afterwards dispute the authority of such agent. *Whart. Ag.* 19. *Allegans contraria*, etc. Proof of ratification may be inferential. *Whart. Ag.* § 87. Reaping the fruits of an act is ratification. *Qui sentit*, etc.; *Allegans contraria*, etc. *Wheeler & Wilson Co. v. Aughey* (1891), 144 *Pa.* 698, 27 *Am. St.* 638, n.; *Ward*, 26 *Ill.* 447, 79 *Am. Dec.* 385, n. Forged note; ratification of must be upon a consideration. *Workman*, 33 *Ohio St.* 405, 31 *Am. Rep.* 548-555, n.

Ratification once made is final and conclusive. *Sto. Ag.* 242, 250. It is like an election. See *ELECTION*.

A party who adopts a contract by ratification is bound by it as though he were an original party. *Whart. Ag.* 73, *Mech.* 169; *Hyatt v. Clark* (1890), 118 *N. Y.* 563, *Mech. Cas. Ag.* 177; *Allegans contraria*, etc. See *WAIVER*; *ELECTION*; *CONFIRMATION*; *ACQUISITION*.

Ultra vires acts. Unconstitutional indebtedness cannot be ratified. *Doon Tp. v. Cummins* (1892), 142 *U. S.* 366, 35 *L. ed.* 1044; *Hitchcock v. Galveston*, *U. S.* (extreme case, allowing ratification); *Mech. Ag.* 114, *Van Fleet*, *Coll. Att.* 14, 16. *Quod ab initio*, etc.

Full knowledge of facts essential for. *Pacific*, 145 *Calif.* 352, 104 *Am. St.* 42.

ONCE A MORTGAGE, ALWAYS A mortgage. Howard v. Harris.

ONUS PROBANDI: Burden of proof. Bonnell: 185; *Actore*, etc.

OPENING A JUDGMENT: 2 Bouv. Dic. 549; Needham: 261. See **DEFAULTS**.

OPENING AND CLOSING OF CASE: See **BURDEN OF PROOF**; Bonnell: 185; **RIGHT TO BEGIN**. The burden of proof devolves on the party holding the affirmative. 1 Gr. Ev. 74-81; 2 Bouv. Dic. 549; *Actore*, etc.

OPERATION OF LAW: See *Expressio eorum*, etc. Discharge of contracts by. Ans. Conts. 326, 337.

OPINION EVIDENCE: See **EXHIBITS**; 1 Ell. Ev. 671-686; 1 Wigm. Ev. 650-721.

OPINIONS; JUDGMENTS; DISTINCTIONS. Cohens: 244; Martin v. Evans; 2 Bouv. 550-553; And. Dic. See **PRECEDENT**; **DICTUM**.

Scope and effect of. Cohens: 244. Are not a part of the mandatory record. Cohens: 244. § 87, Hughes' Proc.

Cannot be pleaded for *res adjudicata*. See **Id.**

Judgments do not rest on. Phoenix Ins. Co., 53 Neb. 811, 40 L. R. A. 408. See **MANDATORY RECORD**; *Fabula*, etc.

Dictum does not bind. S. v. Baughman: 268; Cohens: 244; Martin v. Evans.

OPPRESSION: See **COSTS**; **EXTORTION**.

OPTIMA ENIM EST LEGIS INTERPRETATIO: Usage is the best interpreter of law. § 7, Gr. & Rud.

OPTIMUS INTERPRETIS RERUM USUS: Usage is the best interpreter of things. Bro. Max. 917-931; Wigglesworth: 402; Blackett; Cooper v. Kane (Sand Case); Pym: 52; R. v. Esop; Partridge. § 231, Hughes' Proc.

ORAL EVIDENCE: A leading rule is, that oral contemporaneous evidence is inadmissible to alter or vary a writing. As will be noted, this rule has many exceptions, still in many cases it is respected for reasons perceivable from morals and convenience. § 53, **CONVENIENCE**, Gr. & Rud. It is well illustrated in *U. S. v. Cramp* (1907), 206 U. S. 118 (ship company could not contradict a release of damages caused by the government's delaying the construction of the battleship *Indiana*).

There are many exceptions to the rule that oral contemporaneous evidence is inadmissible to alter or vary a writing. Records yield to the exception, as where one party has carried on litigation in the name of another, the real party in interest may be shown. Issues may be identified and explained if consistent with the record. But these exceptions must be considered consistently with the rule: "What ought to be of record must be proved by record."

Iversille: 46; cases; *Expressio unius*, etc.; *De non apparentibus*; Crain v. U. S. §§ 143, 228-232, Hughes' Proc.

The following exceptions may be considered:

1. To show the real party in interest, he who controlled and di-

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rected the litigation. Bauerman: 48; **RES ADJUDICATA**.

2. To identify and explain the issues, if consistent with the record. Mondel: 77; Fayerweather (instructive case). See **RES ADJUDICATA**.

3. To identify the thing sold in the laws of sales, *e. g.*, "your wool" may be explained and made certain.

Laws. Conts. 380; Leake, 211; Ans. 246; Peck v. U. S.; 3 Page, Conts. 1216-1218 (the parole evidence rule).

4. To show the sealing and delivery of a deed. Welborn: 388; Hughes' Conts. 32.

5. To show the amount of a consideration, even for a deed. Jackson v. Cleveland; notes, Rann: 312.

6. That an absolute deed was nevertheless a mortgage (Howard v. Harris), or was given in trust. See **MORTGAGE**.

7. That the delivery of a deed was to a third person as an escrow. Smith, Conts. 12; Elwell v. Shaw.

8. What was done under the contract.

See **PRACTICAL CONSTRUCTION**; *Contemporanea expositio*, etc.; Maher v. S.: 255; New England Co. v. Standard Co.; Harper v. City Fire Ins. Co.: 218; Brown v. Spofford: 54; *Verba intentione debent interpretari*; *Ut res magis valeat quam pereat*; *Noscitur a sociis*; *Res ipsa loquitur*; *Probatis extremis præsuntur media*; Smith, Conts. 50, 51; Whart. Conts. 653 ("Tell me what you have done under a deed and I will tell you what that deed means"); Moller.

9. (a) To prove the existence of the agreement; (b) the fact of the agreement; (c) and the terms of the agreement. Ans. Conts. 329; Laws. 372.

10. That a clear, express and unequivocal provision for fixed, liquidated and stipulated damages is nevertheless a penalty. Kemble: 391.

11. That a complete executory contract was made as an escrow, upon a condition precedent, upon the happening of which it was to become operative. The failure of this condition precedent may be shown. *Pym v. Campbell*, L. C. 52, is widely cited for this rule. Laws. Conts. 376; Smith, 12; Ans. 242, 243.

12. That the contract is one recognized as of that class which may be oral, and that it is partly written and partly oral.

Malpas (collateral oral stipulation); Goss (no link in the chain can be supplied where the Statute of Frauds requires the contract to be in writing).

13. That a latent ambiguity may be explained and removed by oral

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evidence. (See *Ambiguitas verborum*, etc., Max. No. 20, §§ 223-232 Hughes' Proc.; AMBIGUITY.) Doubtful, equivocal or uncertain language arising *de hors* the instrument may be explained by evidence *aliunde* (See AMBIGUITY: cases.), e. g., if a grantor has two parcels of land and calls each Blackacre, and in a conveyance sells Blackacre, then which is intended may be shown by oral evidence. Whatever doubt arises by evidence or facts *aliunde* may by the same means be removed. Otherwise, if it be a patent ambiguity, and this cannot be so explained, it is fatal. By the omission of the name of a payee, or grantee, or devisee, more than blanks for these must appear. Here are important rules; elsewhere they are illustrated. A patent ambiguity is a stumbling-block in an instrument; it is of grave import.

Smith, Conts. 49, 50; Ans. 248; Laws. 382; notes to Woollam: 53; White & T. L. Eq. Cas.; 1 Gr. Ev. 297-301.

14. That a custom or usage may be explained by oral evidence, and how it relates to the parties, and to annex incidents and implications (*Expressio eorum*, etc.; Partridge), if only the express words of the contract are not nullified and a repugnancy to the clear, express terms does not result.

See Harper: 218; *Optimus interpret rerum usus*; CUSTOM; USAGE; Wigglesworth: 399; Blackett: 400; Smith: 401; Cooper: 403; Laws. Conts. 383; Laws. U. & Cus. 181, 218.

Courts will apply *Ut res magis valeat quam pereat* to save a contract, if possible, and for this will admit oral evidence. (Harper: 218; *Verba intentione*.) Absurdities are avoided if possible.

Applications of phrases like the words "seaworthy," "turntable," "reasonable." Laws. Conts. 331; Ans. 246.

15. That wherever relevant, it is admissible to show fraud, accident or mistake. Oral evidence is a means of assailing fraud wherever it is alleged and is in issue.

Ex dolo malo non oritur actio; Cornfoot: 385; Assurance Co., 183 U. S. 308; Crim. 162 Mo. 544, 85 Am. St. 541: cases; Harris, 119 N. C. 34, 56 Am. St. 656-672, ext. n.

Accident is a defense generally. (*Actus Dei*, etc.) Mistake, like fraud, may be orally shown. (Brown: 347; Kyle: 348; Wheadon: 349.) Judicial records may be shown to be fraudulent by oral evidence. (Dimes: 176; *Ex dolo malo*, etc.)

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16. That the consideration moved from an unknown or undisclosed party to the contract. (Thomson: 342. See AGENCY.)

17. That the contract was made for or in behalf of a third person, as where one not known in the contract and who has afterward ratified or taken benefits under it. (Hendrick: 319; Elwell v. Shaw; Sturdivant: 410.)

18. That it is admissible to support equitable remedies, such as cancellation, rescission, reformation, rectification and specific performance generally.

See Woollam: 53; White & T. L. Eq. Cas.; Seton v. Slade (specific performance).

19. That judicial and other records may be set aside for fraud, usurpation and abuse of power by oral evidence.

Needham: 261; Ferguson: 264; Borden: 267; Dimes: 176; *Ex dolo malo*; Iveslie: 46: cases; Goss: 55; *Nullus commodum*.

20. The capacity in which a party signed a contract, whether as principal or guarantor and surety. (Brown: 54.)

21. That the true state of the execution and delivery of a contract may be shown.

22. That the rule excluding oral evidence only applies to parties and privies, and not to third persons.

Res inter alios acta, etc.; Max. No. 37, §§ 334-342; §§ 216, 226, 227, 265, Hughes' Proc.

23. Receipts may be contradicted. Tobey; 1 Gr. Ev. 213, 305. See RECEIPTS.

24. That equitable exceptions to Statute of Frauds may be shown. (Lester: 341.) The phrase "act and operation of law" is permissive of admitting oral evidence. (Lyon. See FRAUDS AND PERJURIES.)

25. That the discharge, abrogation, modification or substitution of a written contract may be shown.

Nihil tam conveniens, etc.; *Modus et conventio*, etc.: cases.

It has been held that while a contract under seal remains executory, still it is not subject to change or alteration by an unsealed instrument. (Loach, *sub* Gibson.) This has been the subject of extended discussion, as will appear by reference to *Hibblewhite v. McMorris*. (See Mechem, Agency; Dev. Deeds; 2 Whart. Conts. 690.) As to this, the intention of the grantee should

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control. The conclusiveness of a deed is to his interest. *Nihil tam conveniens; Fiunt.*

All antecedent negotiations, oral or written, merge in the written agreement. § 53: CONVENIENCE, Gr. & Rud.; U. S. v. Bethlehem Co., 205 U. S. 105: cases.

To explain contradictory words. Traders, 86 Miss. 135, 109 Am. St. 698, n.; *Nosciatur a sociis.*

Exclusion of oral evidence a rule of public policy. It is founded on protection, also convenience. § 53: CONVENIENCE, Gr. & Rud.; 1 Gr. Ev. 275; Laws. Conts. 272; Smith, 41, 42; Malpas; Laws. Conts. 378; Ans. Conts. 241; Hughes' Conts. 86, 87; Partridge v. Ins. Co.; *Fiunt enim de his contractibus scripturæ, ut, quod actum est, per eas facilius probari poterit.* The ease, facility and certainty that one stipulates for in writing should stand as proof.

Leading cases: Pym: 52; Woollam: 53; Wigglesworth: 399; Harper: 218; Sturdivant: 410.

Express trust cannot be annexed to a deed by oral evidence. Horne v. Higgins.

"Once a mortgage always a mortgage." Howard v. Harris; W. & T. L. C. Eq. See MORTGAGES.

Of the admissibility of parol or verbal (oral) evidence to affect that which is written; written evidence. By written evidence, in this place, is meant not everything which is in writing, but that only which is of a documentary and more solemn nature, containing the terms of a contract between the parties, and designed to be the repository and evidence of their final intentions. *Fiunt enim, etc.*

When parties have deliberately put their engagements into writing, in such terms as import a legal obligation, without an uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, was reduced to writing; and all oral testimony of a previous colloquium between the parties, or of conversation or declarations at the time when it was completed, or afterwards, as would tend in many instances to substitute a new and different contract for one which was really agreed upon, to the prejudice possibly of one of the parties, is rejected. *Contra scriptum testimonium non scriptum testimonium non fertur.* Against written testimony unwritten testimony shall not be brought forth. In other words, as the rule is now more briefly expressed, "parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument."

1 Gr. Ev., § 275; Bro. Max. 608, n., 620, 621, 652, 657, 662, 666, 667, 928, 931, 8th ed.; Line, sub *Expressio unius*; Woollam: 53; Pym: 52; Wigglesworth: 399; 2 Page, Conts. 1198-1236; § 53: CONVENIENCE, Gr. & Rud., also §§ 59, 218, 272, 287, *id.*

"What ought to be of record must be proved by record and by the right record." Records required by law are conclusive; oral

Oral Evidence.—

evidence cannot affect. 1 Gr. Ev. 275, n.; Nixon: 127; Iversille: 46. See *Res adjudicata*; Haven, 121 Mich. 51, 80 Am. St. 477-484, n.; *Expressio unius; De non apparentibus.*

Real party in interest may be shown by oral evidence. Bauerman: 48.

A magistrate cannot impeach his own record. 1 Gr. Ev. 275, n.; Fayerweather. *Recorda sunt vestigia vetustatis et veritatis.* A sheriff's return is conclusive; it cannot be supplemented. 1 Gr. Ev. 275, n. See Hauswirth: 51; Bro. Max. 597.

Conclusiveness of such records. It is held they are conclusive in Brittain: 50; Cool. Const. Lim. 501, 6th ed. (record, if regular, is conclusive); note, Calder v. Hal- ket; Evansville R. R. v. Evansville (1860), 15 Ind. 395, 421: cases; 1 Gr. Ev. 275, n.; Bailey, Jurisdic. 183; Mondel: 77; 80 Am. St. 477-481. See LEGISLATIVE JOURNALS; *Res adjudicata.*

The integrity of commercial paper cannot be impeached by adding to it an oral condition after its delivery to the payee. 1 Rand. Com. Paper, 199, 227; 1 Danl. 68, 81; Stewart, 59 Ind. 375; Jones, 67 Mo. 667; Badcock, 1 Root (Conn.), 87. See Benton, 52 N. Y. 574. One of the makers of a note may explain whether he signed as surety, guarantor or indorser. Brown: 54; Jones, 16 Wis. 562 (manner of paying a note). To affect contracts. Wigglesworth: 399; Sturdivant: 410; Woollam: 53; Pym: 52. Cannot affect judgments. Iversille: 46.

Discharge or substitution of agreement may be shown by oral evidence. Browne, Stat. Frauds, 429-436; 1 Gr. Ev. 302; 1 Mech. Sales, 474. *Contemporanea expositio.*

Agency; oral evidence in cases of. Huffc. Ag. 123, 138, 139; U. S. v. Gooding: 202. Generally: L.C. 46-60, 399-403; § 53: CONVENIENCE, Gr. & Rud.; 1 Gr. Ev. 275-305; 4 Wigm. 2400-2478; 2 Page, Conts. 1189-1236; 1 Ell. Ev. 568-620.

ORDER: And motion for, defined. Bliss, Code Pl. 420. *Order of proof of presenting evidence.* Sub Bonnell: 185; 3 Wigm. 1866-1912 (excellent resume). See REBUTTAL; RIGHT TO BEGIN; § 272, Gr. & Rud. Is in discretion of court. 1 Gr. Ev. 51a; Stephens (1897), 16 Utah, 22, 67 Am. St. 595, n.; 3 Wigm. 1863-1900; § 53: CONVENIENCE, Gr. & Rud.; 29 Cyc. 1511-1521.

ORDINANCES; BY-LAWS: Of municipal corporations. See McQuillan (most instructive and valuable work on construction, government and constitutional law).

ORDINE PLACITANDI SERVATO, *servatur et jus:* The order of pleading being preserved, the law is preserved. Co. Litt. 303, Bro. Max. 188. Order of pleading essential; R. v. Gibson: 149. See FORMS OF THE LAW.

ORIGO REI INSPICI DEBET: The origin of a thing ought to be inquired into. 1 Coke, 99. Origin of a thing should be known, *e. g.*, the statutory record. *Melius petere fontes quam sectari rivulos.*

ORE TENUE: This in form is raised by an appellate court *sua sponte*; and therefore this idea is of a truly fundamental character. Campbell: 2; Harrigan, sub MAGNA; And. Dic. See DEMURRER.

ORIGINAL ENTRY: 2 Bouv. Dic. 458. See BOOKS OF ACCOUNT.

ORIGINAL PACKAGE: 2 Bouv. Dic. 559; Lelsey; Bartemeyer: cases; Austin v. Tenn.: cases; May, 178 U. S. 496 (discusses rule in Brown v. Maryland, 12

Original Package.—

Wheat. 419; Brown, Jurisdic., §§ 63, 83c. *Sale of intoxicating liquors*. McClain, C. L. 76, 1204, 1205.

OSBORN v. BANK OF U. S. (1824), 9 Wheat. (U. S.) 738, 6 L. ed. 204, Marshall's Const. Dec. 468-511; Bonaparte: 278.

OSBORN v. MONCURE (1829), 3 Wend.

170, Redf. L. C. N. 493, 487, n.
A cause of action must be complete when it is sued upon. Maryland Co., 87 Md. 207, 39 L. R. A. 810; *Fabula*, etc. It cannot be aided by subsequently accruing facts. Nash, Pl. & Prac. 646 (Sibley).

A wrong must be described before jurisdiction can attach. See JURISDICTION; *Leges non verbis*, etc.; *Rushton*: 5, and *Cooke*: 321.

A claimant (*Williams*: 94), a respondent and a wrong described, is jurisdictional. No parties, no power to act. Sto. Pl. 10, 259. *Rushton*: 5; *R. v. Wheatley*: 19; Bro. Max. 329, citing *Kingston's Case*: 76; *S. v. Baughman*: 268; *De non apparentibus*, etc.

And only a party in interest can assign error. *Gibler*: 96; California: 270. Or interplead in a cause. *Fleming, Ex parte* (1804), 2 Wall. 759.

OSCANIAN v. WINCHESTER CO.: L.C. 41.

OSGOOD v. R. R. (1905), 77 Vt. 334, 70 L. R. A. 930.

Osgood stated: A statute made trainmen criminally liable for negligence and the railroad liable for damages. O. leased of the railroad the right to occupy a part of its right of way and also exempted it from liability from fire and the negligence of its operators. These negligently damaged O. by running an engine off the track against his property. For this he sued, and sought to recover notwithstanding his lease. *Held*, he could not. *Ad ea frequentius*, etc.

Men have the right to contract as they please, if not illegally. *Salus populi suprema lex*; *Volenti non fit injuria*; *Modus et conventio*, etc.

A contract may be partly valid and partly void. *Mitchel*: 372; *Pigot's Case*; *Sprague* (U. S.): 236; *Mallan*: 373; *Ut res*, etc.

Reason is the soul of the law. *Church v. U. S.*; *St. Louis Beef Co. v. Casualty Co.* "He who knoweth not the reason of the law knoweth not the law itself." See REASON. "When the mind labors to discover the design of the legislature it seizes everything from which it can derive aid." *U. S. v. Fisher*, 2 Cranch, 358, 386; *S. v. Kelly*.

Penal statutes are strictly construed. *Ellis v. U. S.*

OTHER CRIMES: Evidence in one transaction to prove another. *P. v. Molineux*; *Strong v. S.*: 213a; *Res inter alios*, etc.; SYSTEM.

OUTRAM v. MOREWOOD: L.C. 25.

OVERTON v. TYLER (1846), 3 Pa. 346, 45 Am. Dec. 645-647, n., 1 Am. L. C. 363-411, n.; 1 Danl. Nego. Insts. 6; 4 L. R. A. 192; Redf. L. C. N. 148, 1 Pars. Conts. 263.

Negotiability of instruments; promissory note: requisite of. *McCormick*; *Gerard*; *Murray*. See COMMERCIAL PAPER; Bouv. Dic.

Overton v. Tyler.—

Commercial paper is "a courier without luggage." 1 Danl. Nego. Insts. 61. Bills "to bearer" are transferable and negotiable. Non-negotiable instrument gives but an equity. Indorser of non-negotiable paper not liable as in negotiable. Overdue paper may be negotiated. Swift. Money (cash) passes on delivery. *Miller v. Race*; *Swift*.

OWEN v. WESTON (1885), 63 N. H. 599, 56 Am. Rep. 547-554; 67 L. R. A. 179-195, ext. n.

Amendments of record, etc. *Jacks*, 56 O. St. 397, 60 Am. St. 749: cases, n. Of pleadings. See Walden. Of judgments. *Owen*; *Scammon*, 118 Cal. 293, 82 Am. St. 226, n.; *Day*, 104 Ia. 374, 65 Am. St. 465, n. (*nunc pro tunc* entries).

Nunc pro tunc entries. *Missouri*, etc. Co., 144 Mo. 253, 66 Am. St. 417, n.; *Dawson*, 89 Mo. Ap. 245; *Collier v. Catherine Lead Co.*, 208 Mo. 246, 106 S. W. 972 (liberal rule. Notice unnecessary if made from files and records); *Hyde*, 52 Neb. 680, 66 Am. St. 533, n.; *Knefel v. P.*, 187 Ill. 212, 79 Am. St. 217, n.; *Ware*, 123 Ala. 427, 82 Am. St. 132, n. (liberal rules recognized). Execution may be amended after its return. *Taylor*, 61 Kan. 694, 78 Am. St. 346.

In amending records the rights of third persons are to be considered; also of one acting on the faith of their permanency. Allowing amendments is often a good faith proposition. Phases of estoppel have often to be considered.

Judgments *nunc pro tunc* can be entered only when there is something in the record which furnishes a basis to amend by. *Young*, 135 Mo. 624, 88 Am. St. 440, n.

Court cannot set a judgment aside after close of term. *Tubman v. Baltimore R. R.* (1903), 190 U. S. 38.

OXFORD'S CASE: *Sub Needham*: 261. Power of equity to correct judgments. Over this case *Bacon* and *Coke* contended; the views of the former prevailed.

OXLEY STAVE CO. v. BUTLER CO. (1897), 166 U. S. 648, 41 L. ed. 1149. Record proper must disclose a federal question. See *Furman*: 147a.

OYER: 2 Bouv. 567; And. Dic.

PABST BREWING CO. v. CRENSHAW (1895), 198 U. S. 17.

Construction of state statute by state court conclusive. See STATUTE; *Terre Haute R. R. v. Indiana*; *Graham v. Folsom*; *Ughbanks*, 208 U. S. 481; *Hulbert v. Chicago*; §§ 70, 151, 268, Gr. & Rud.

PACI SUNT MAXIME CONTRARIA, vis et injuria: Force and wrong are especially contrary to peace. Co. Litt. 161. Force and wrong are opposed to peace.

PACTA CONVENTA, QUAE NEQUE contra leges, neque dolo malo inita sunt; omni modo observanda sunt: Contracts which are not illegal, and do not originate in fraud, must in all respects be observed. Code, 2, 3, 29; Bro. Max. 698-732.

All contracts are valid if not illegal. *Cutter*: 308; *Holman*: 363; *Privatis pactionibus*, etc.; *Privatorum conventio*, etc.; *Nulla pactione*, etc.; *In mercibus illicitis*, etc.; *Jus publicum privatorum*, etc.; *Pactis privatorum*, etc. *Hollister*: 354; *R. R. v. Lockwood*: 352; NEGLIGENCE; CHRISTIANITY; *Ingersoll*, 117 Tenn. 263, 119 Am. St. 1003-1041 (*champertous contracts of attorneys*); *Union Collection*

Pacta Conventa.—

Co., 150 Calif. 159, 119 Am. St. 164-181, ext. n.

Cited, §§ 4, 18, Hughes' Conts.; § 300, Hughes' Proc.; § 71, Gr. & Rud.

PACTA DANT LEGEM CONTRACTUI:

Agreements give the law to the contract. Halker's Max. 118. See **ASSENT**; *Modus et conventio*; *Non hæc*.

PACTA PRIVATA JURI PUBLICO

derogare non possunt: Private contracts cannot derogate from the public law. 7 Coke, 23, *Salus populi*, etc.; Holman: 363; Ry. Co. v. Lockwood: 352; St. Louis R. R. v. Pitcock, 82 Ark. 441, 118 Am. St. 84; *Privatis pactionibus*, etc.; *Jus publicum privatorum*, etc.; 180 U. S. 476; e. g., jurisdiction and power are vested for the public welfare, and therefore are not the subject of contract. *Jurisdicio est potestas*, etc.; *Pactis*, etc.

Cited, §§ 18, 133-136, Hughes, Conts. See pp. 8-17, Ans. Conts. 224; NEGLIGENCE. § 25, Hughes' Proc.

Pacta quæ contra leges constitutionesque vel contra bonos mores sunt, nullam vim habere, indubitati juris est: It is indubitable law that contracts against the laws, or good morals, have no force. Cod. 2, 3, 6; Bro. Max. *Salus populi*, etc.; Holman: 363. *Nullus commodum*, etc., §§ 5, 5b, Hughes' Proc.; §§ 60, 71, 96, 304, Gr. & Rud.; Campbell: 2a; Hegarty.

Pacta quæ turpem causam continent non sunt observanda: Contracts founded upon an immoral consideration are not to be observed. Dig. 2, 14, 27, 4; Bro. Max. *In pari delicto*, etc. See **CHRISTIANITY**.

Pactis privatorum juri publico non derogatur: Private contracts do not derogate from public law. Bro. Max. 695, 696, 732, 8th ed.; *Salus populi*, etc.; *Jus publicum*, etc.; Diggle: 371; Holman: 363; *Nullus commodum*, etc.

Cited, § 18, Hughes' Conts.; §§ 25, 154, 158, 297, 303, 304, Hughes' Proc.

PAGE v. HEINBERG (1853), 40 Vt. 81, 94 Am. Dec. 378-387, ext. n. (capacities of corporations to take title to realty). See *Ultra vires*; Hill v. Boston.

PAIN, EX PARTE: L.C. 107.

PALFREY v. PORTLAND R. R.: Sub Cumber: 311.

PARADINE v. JANE: Stated in Robinson: 309; 81 Am. Stat. 273-475 (parties may contract against accidents); 3 Page, Conts. 1381; 9 Cyc. 628; § 302, Hughes' Proc.

PARISO v. U. S. (1907), 207 U. S. 368-372.

Due process of law; sufficient record to support. A complaint sufficiently clear to the mind of a person of rudimentary intelligence as to what it charges the defendant with, informs the accused of the cause of accusation against him and a conviction thereunder is not in that respect not without due process of law under the Philippine Bill of Rights. See Guedel: 74a; **INDICTMENT**.

A federal question cannot be injected into a cause by the assignment of errors in the state court.

Errors must be assigned; otherwise it is vain to argue them. What ought to be of record must be of record and in the right record. *De non apparentibus*.

PARDONS: Power of governor. S. v. Wolfer (1893), 53 Minn. 135, 9 Am. Cr. Rep. 492-494, n. (conditional); R. v. Dudley: 2 Bouv. 571-573; And. Dic.; 29 Cyc. 1558-1575.

PARENT: How far bound to support a child. Ans. Conts. 80. See **INFANTS**. *Illegitimate child; when mother and when father may have custody of*. Aycock v. Hampton (1904), 84 Miss. 204, 65 L. R. A. 689-697, ext. n.; 29 Cyc. 1576-1589.

PARKINSON v. P. (1890), 130 Ill. 401, 10 L. R. A. 91, n. S. P., Crain v. U. S.

PARLIAMENT: Power of, is omnipotent. Bro. Max. 5; Thorpe, sub **CONSTITUTIONS**; Calder: 237; Stockdale: 277; Dash: 237a; Thomas v. R. R. § 268, Gr. & Rud. See **LEGISLATIVE POWER**; **FUNDAMENTAL LAW**.

Cannot create a cause of action, nor the elements of an obligation. See CAUSE OF ACTION; Ex nudo.

PARLIAMENTARY LAW: 29 Cyc. 1686-1692.

PAROL (ORAL) EVIDENCE: Inadmissible to affect the mandatory record. Iversille: 46; Crain v. U. S. Cannot affect a writing. Pym: 52; Wooliam: 53. Admissibility to affect commercial paper. American Gas. Co., 90 Me. 516, 43 L. R. A. 449-487, ext. n.

What ought to be of record must be proved by record. Expressio unius. See pp. 8-14, Hughes' Proc. **ORAL EVIDENCE**; **RULES**: 3 Cyc. 804-809.

PARTICIPATION IN CRIME: See Spies; McClain, C. L. 194-206; **ACCESSORY**.

PARTICULARS: See **BILL OF**; Cryps; McClain, C. L. 976. Variance from, not fatal, it is held. Zellers.

PARTIES: Williams: 93, 94; cases. Due process of law requires. Murray: 219; §§ 33, 312, Gr. & Rud. There must be a wronged person. §§ 283, 312, 313, Gr. & Rud.

To contracts. §§ 282-283, Gr. & Rud.

A wronged person essential to confer jurisdiction upon the court. See CONSIDERATION; CONTRACT; S. v. Baughman: 268; Williams: 93, 94; Watkins: 269; Borden: 267; Sto. Pl. 259; Cool. Const. Lim. 196, 6th ed.; Proprietors Mexican Mill, 4 Nev. 40, 97 Am. Dec. 510-513, n.; Baker, 32 Ill. 79; *Actio non damnitatio*; §§ 79, 224, Hughes' Proc.; 15 Cyc. Pl. & Pr. 611; 4 Cyc. 79-91 (rights and liabilities upon assignments); 4 Cyc. 338-339 (assumpsit); on appeal. 2 Cyc. 756-789, 684-691.

Description of must be certain; the rules of res adjudicata and other conserving principles suggest this. Fabula non judicium. Pleadings must be certain. See CONSTRUCTIVE NOTICE; CERTAINTY.

Initials insufficient. Wiebold: 98; Thornilly; Moynahan (*idem sonans*). See **NAMES**; 2 Bouv. Dic. 578-585; Bliss, Pl. 20-111; 2 Whart. Conts. 784-848.

Parties to contracts. Competent parties may make any contract they please. Cutter: 308; §§ 3, 4, Hughes' Conts. May contract against accidents. § 4, Hughes, Conts. Paradine. And for impossibilities. §§ 4, 70, Hughes' Conts. Competent parties to contract. §§ 42a, 52-65, Hughes' Conts.

Who may sue upon a contract. § 129, Hughes, Conts.; Ans. Conts. 209; Williams: 93; *Fabula non judicium*. Under codes, real party in interest must sue. § 132 Hughes, Conts.

Real party in interest, in the meaning of statutes defining parties. Stewart, 64 Kan. 191, 64 L. R. A. 581, ext. n. See **REAL PARTY**.

An appellate court will only reverse upon the application of a wronged party. So. Pac. R. R., 168 U. S. 1-66; Fabula. Only an injured party can complain. Sub Williams: 93; Watkins v. S.: 269; Campbell: 2. Fabula, etc.; Actio non datur, etc.

Parties.—

- Jurisdiction depends on.* Pennoyer: 58; Title Co., 150 Calif. 199-226, 119 Am. St. 199. *Audi.* Starbuck: 253; Needham: 261; Borden: 267; Baker v. Backus, *supra*. *Parties must be described with certainty.* 1 Freem. Judg. 50a (pleadings must be certain); *Fabula*, etc.
- ✓ *One may sue for all, when the parties are numerous.* 68 Am. St. 871, n.; Chicago v. Collins (1898), 175 Ill. 445, 49 L. R. A. 408, n.
- ✓ *New parties may be brought in.* See Code provisions; Mackenzie v. Hodgkin (1899), 126 Cal. 591, 77 Am. St. 209. Intervention allowed. See INTERVENTION.
- ✓ *Real party in interest; absence of, may be waived.* So held in Wakeman v. Norton (1897), 24 Colo. 192, 195; 15 Cyc. Pl. & Prac. 707. See *Coram judice*; Agricultural Ditch Co. v. Independent Ditch Co. (1896), 22 Colo. 513, citing Walworth v. Holt, 4 Mylne & Craig, 619. See Bliss Pl. 45, n.
- A suit by an officer for the state does not make the state a party.* Tuchman, 42 F. R. 548; Davis, 16 Wall. 203. See Cohens: 244. *Who are parties.* Walker, 195 Pa. 168, 78 Am. St. 801.
- ✓ *Legal capacity to sue; defect of, may be waived.* Meyer, 97 Wis. 352, 65 Am. St. 124, n.
- Appeals, who may take.* Switzer, 201 Mo. 66, 119 Am. St. 731-762, ext. n.
- ✓ *One managing, directing and contracting litigation is bound by the result although not a party to the record.* Bauerman: 48; Montgomery v. Alden, 133 Ia. 673, 119 Am. St. 648-650 (instructive case); Pew v. Johnson, 35 Mont. 173, 119 Am. St. 852-858 n.
- Equity; parties in.* Harrigan, *sub* MAGNA. 16 Cyc. 181.
- Only a party in interest can interplead; and this interest must appear.* Fleming, 2 Wall. 759 (pleadings must be certain).
- Only a wronged party, describing himself, can apply for relief.* Bliss, Pl. 181; *Fabula*; *Ex nudo*.
- Defect of parties must be aptly made, and by plea of abatement, else it is waived.* Sheridan, 19 Ind. App. 252, 65 Am. St. 402, n.
- ✓ *Absence of a party must be specially objected to.* Supreme Tribe of Ben Hur v. Hall (1900), 24 Ind. Ap. 316, 79 Am. St. 462; Aetna Life Ins. Co., 154 Ind. 370, 77 Am. St. 481.
- From the view that a court is created and only exists to give remedies to a wronged party, it is easy to deduce that such must be named and be described as the wronged party.* *Fabula*; *Leges non verbis*, etc.
- ✓ *All parties to a judgment must be joined.* Day, 104 Ia. 374, 65 Am. St. 465. See Ferguson: 264.
- ✓ *Misjoinder and nonjoinder.* Rice: 95; Smith, Lead. Cas.; Bliss, Pl. 20, 134.
- ✓ *Joinder of, requires that a cause of action be stated for all, else there is want of facts.* Am. Bank, 152 Ind. 582, 588; 71 Am. St. 345, 350; cases. All must be alike affected. Bliss, Pl. 123. *Two cannot contract for a third without his privity.* Ans. Conts. 209; *Res inter alios*, etc. Hendrick: 319.
- Deeds; only parties to can sue thereon.* Cooch; Williams: 93.
- Parties to contracts.* Rules of contract and procedure act and react upon each other. Boston Ice Co.: 320; cases; Texas R. R. v. Humble.
- ✓ *Plaintiffs.* 2 Whart. Conts. 784-843. Defendants. 2 *id.* 809-813. Joint plaintiffs and

Parties.—

- defendants. 2 *id.* 814-823. Joint defendants must be sued jointly. 2 *id.* 824-835. *Official bond.* An action by a third person cannot be maintained on an official bond, unless authority therefor can be found in the statute. City, 127 Mich. 1, 89 Am. St. 451 (party in interest must sue).
- Plaintiff's control of suit brought for all similarly situated.* Hirshfeld, 157 N. Y. 166, 46 L. R. A. 839, n. *States as parties in United States Supreme Court.* Kansas v. Colo. (1902), 185 U. S. 125.
- PARTITION:** Agar v. Fairfax. Elements. Denton, 65 Kan. 1, 93 Am. St. 282, n. (demand for possession essential); 2 Bouv. Dic.; And. Dic.
- PARTITIONING OF THE LAW:** It is not analysis. Munday: 79; Garland: 60, note; R. v. Wheatley: 19.
- Literature influenced by theory of.* See LITERATURE; *id.* Hughes' Proc.
- Difficulties in.* Cool. Torts. 1-10. See ADJECTIVE LAW; SUBSTANTIVE LAW; INTRODUCTION: Hughes' Proc.
- PARTNERS:** Waugh v. Carver; 2 Bouv. Dic. 586-608. Contracts of. Livingston.
- PARTNERSHIP:** As creating a general agency. Ans. Conts. 334; 2 Gr. Ev. 477-486, 2 Bouv. 586, 608, And. Dic. 749-755; 2 Page, Conts. 937-959; § 311, Hughes' Proc.
- What constitutes a.* Brotherton, 144 Mich. 274, 115 Am. St. 397-443, ext. n.
- Levy on partnership property for the debt of a partner.* Skavdale, 21 Wash. 10, 46 L. R. A. 481-502, ext. n.
- Liability of, for torts.* P. v. Citizens, 111 Ga. 73, 51 L. R. A. 463-496, ext. n.
- As a contract.* Livingston: 345.
- PART PERFORMANCE:** When it takes case out of Statute of Frauds. Ans. Conts. 63, 64; 1 Beach, Conts. 690-701. See FRAUDS AND PERJURIES: cases.
- PARTRIDGE V. INS. CO.** (1873), 15 Wall. 573, 21 L. ed. 229.
- Usage: Custom: inadmissible to alter or vary written contract.* Citing Cooper: 403; Neilson v. Harford; ORAL EVIDENCE; *Expressio unius.*
- Setoff favored in federal courts for convenience.* Defense of, if pleaded, is waived if not objected to. Limitations of waiver: Deutsch v. Wiggins.
- PARTY WALLS:** Dunscomb v. Randolph (1901), 107 Tenn. 89, 89 Am. St. 915-945, ext. n.
- PASLEY V. FREEMAN:** L.C. 375.
- PASSENGER:** Coggs: 350; 2 Bouv. Dic. 611; Hutch. Carr.
- Who are, on street cars.* Duchemin, 186 Mass. 353, 104 Am. St. 580-589, ext. n. See CARRIERS.
- PATENTS (LAND PATENTS):** 3 Suth. Dam. 1181-1201; High, Injunc.; 2 Bouv. Dic. 612-631; 2 Gr. Ev. 487-515. See COPYRIGHTS; 20 Rul. Cas.
- Must be described.* Toohey, 4 Hughes (U. S.) 253.
- Patents (of inventions).* Damages for infringement of patents, copyrights, or trademarks as affected by loss of profits. Rose v. Hirsh (1899), 94 Fed. 177, 51 L. R. A. 801-825, ext. n.; Gill v. U. S.
- Forms of bills for infringement.* 2 Fost. Fed. Prac. 1301-1305.
- PATERSON V. GANDASEQUI:** Sub L.C. 342.
- PATRICK V. BOWMAN** (1893), 149 U. S. 411, 37 L. ed. 790; Huffc., Reinh., Tiff. Agency.
- Deceit; partners.* Partner in charge, buying out an absent partner, must make full

Patrick v. Bowman.—

and fair representations, for any concealment will vitiate the purchase, as in case of other trustees. Keech; Brooks: 370; 1 Sto. Eq. 316a; Johnson, 3 Smale & G. 419. Duty of partners to each other. Bigl. Fraud, 232-236. Deceit vitiates dealings between partners. Bigl. Fraud, 146-150. See Keech; cases; CITATIONS; DECEIT; Pasley: 375; cases. § 159, Hughes' Proc.

Agent assuming authority for unknown principal binds himself only, and especially if credit is given him. Thomson: 342; Sturdivant: 410; cases.

Contracts by letter; correspondence. Offer made and accepted by letter completes the contract upon mailing the letter of acceptance. Adams: 326; Burton v. U. S. Revoking the offer by letter before acceptance by letter was posted, does not impair such contract. An offer must be revoked before it is accepted. Patrick: cases; CONTRACTS: cases; Mech. Sales, 247.

PAUL: His hearing before Festus and Agrippa involved many important and fundamental questions. The instructions given the Scribes and Pharisees as to the manner of the Romans are fragments of due process of law, of which mention is elsewhere made. See *De non apparentibus*; DUE PROCESS OF LAW.

PAUL v. LUTTRELL (1871), 1 Colo. 491: cases. Inconsistent defenses permissible and admissions in one, inadmissible evidence to affect another. Contra: Crater: cases. See Dickson: 34.

PAULSEN v. PORTLAND (1893), 149 U. S. 30. See DUE PROCESS OF LAW; § 76 Hughes' Proc. (notice essential).

PAUPER: Liability of alleged pauper, or his estate, to pay for support or gifts obtained on the ground of poverty. Anderson, 61 N. J. Eq. 85, 55 L. R. A. 570-578, ext. n. Cannot appeal to supreme court of United States *in forma pauperis* in absence of statute. Bradford v. So. R. R., 195 U. S. 243.

PAXTON, ETC., CO. v. FARMERS', etc. Co. (1895), 45 Neb. 884, 50 Am. St. 585, 29 L. R. A. 833 (title to statute). See Bobel v. P.: 250; Nigrum, etc.

PAYMENT: What is. Tobey; 1 Beach, Conts. 361-402; 7 Cyc. 1005-1051 (commercial paper). *Payment defenses must be pleaded.* Hubler; Field: 84; McKyring: 33; Cumber: 311; 2 Gr. Ev. 516-536. *Into court.* See OFFER OF COMPROMISE; 2 Bouv. Dic. 640.

Accord and satisfaction. Harrison, 67 Kan. 194, 100 Am. St. 386-456, ext. n.; Cumber: 311.

Under the civil and the common law, payment must be made in what was money when the contract was made. San Juan (City) v. St. John's Gas Co. (1904), 195 U. S. 510. *Generally.* 2 Bouv. 640; And. Dic.; 3 Page, Conts. 1393-1401.

PAYNE v. GAYE: L.C. 307.

PAYNE v. DREW: See *Qui prior est tempore, etc.*; Freeman v. Howe: 287.

PEACE BONDS: Not to commit a misdemeanor. S. v. Gilliland, 51 W. Va. 278, 90 Am. St. 793.

PEACHY v. SOMERSET (Parties may stipulate for fixed liquidated damages. Kemble v. Farren): L.C. 392.

PEARCE v. BROOKS (Illegal contracts; *In pari delicto* defenses. Holman: 363; Oscanian: 41): 368.

PEARSALL v. SMITH (1893), 149 U. S. 231; cases, 37 L. ed. 717, n. *Sub LIMITA-*

Pearsall v. Smith.—

TIONS. Concealment of cause of action to remove the bar of statute. Cited, § 147, Hughes' Proc.

PECK v. U. S.: Sub *Lex non cogit ad impossibilia*. One preventing the performance of a contract is liable thereon. *Nul-lus commodum*, etc.

PEDIGREE: Entries in Bible or other religious books; when admissible. Supreme Council, 60 N. J. Law, 565, 41 L. R. A. 449, ext. n.; 1 Gr. Ev. 153, 154; Craufurd, 17 Md. 49, 77 Am. Dec. 323-328, n., 1 Wh. Ev. 222-225; 1 Ell. 360-382; 2 Wigm. 1605. See HEARSAY.

PENAL ACTION: Strict construction for. McClain, C. L. 83; Suth. Stat.

PENAL STATUTES: Are strictly construed. Ellis v. U. S. See STATUTES. Depend on domestic courts. Whitlow v. Nashville R. R.

PENALTY: Rules of law and of equity as to. Ans. Conts. 54. And liquidated damages. Ans. Conts. 255, 311. See Kemble: 391.

PENDING OF ANOTHER ACTION: Must be pleaded. Sub McKyring: 33. See FORMER ACTION; ANOTHER ACTION PENDING; 2 Am. & Eng. Eq. Cas. 195-202.

PENNOTTER v. NEFF: L.C. 58. Morse, 31 Utah, 213, 7 L. R. A. (N. S.) 1127, n. Title Co., 150 Calif. 199, 226, 119 Am. St. 199.

PENNSYLVANIA CO. v. LOTTIE (1905), 72 O. St. 288, 74 N. E. 179, 100 Am. St. 597-612, ext. n.

Common carrier not liable for loss caused by connecting line in the absence of express or special agreement. Brezewitz v. R. R., 75 Ark. 242, 70 L. R. A. 212; cases; K. C. R. R., 74 Ark. 9, 69 L. R. A. 65-67; cases.

The general rule is to the contrary. 106 Am. St. 604; cases.

There is no presumption that a passenger assents to the terms of a complex ticket unless he has notice of what they are. Hutchins v. Pa. R. R. (1905), 181 N. Y. 186, 73 N. E. 972, 106 Am. St. 537; Cherry v. R. R.

Connecting carriers are agents for each other. Cherry; *Qui sentit*, etc.

PENN v. BALTIMORE: L.C. 275.

PENNIWIT v. FOOTE (1875), 27 Ohio St. 600; Brown, Jurisdic. Conclusiveness of judgments. See ESTOPPEL.

PENRUDDUCK'S CASE (1598), 5 Coke (Part V.) 100. Overhanging eaves a trespass. Bro. Max. 369.

PENSIONS: Assignment of. Ans. Conts. 184; Greenh. Pub. Pol.; 2 Bouv. Dic. 647.

P. STANDS FOR PEOPLE; C., Commonwealth; S., State; R., Rex or Regina (King or Queen); U. S., United States. For gathering of cases on crime, see REX CASES.

P. EX REL. ARMSTRONG v. WAR- den, N. Y. City Prison (1905), 183 N. Y. 223, 76 N. E. 11, 2 L. R. A. (N. S.) 859-862, n.

Equal and uniform law; equal operation of laws. Employment agencies may be regulated by statute in the city of New York only. Under the police power laws may be operative in one locality only. Employments in certain localities may be subjected to taxation, while exempt therefrom in other places. Barbier; Brown v. Tharpe.

Laws may be enacted to meet the conditions of great cities, and as exigencies may require. Such laws do not conflict

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with the equal rights clause of the 14th Amendment of the Federal Constitution.

P. EX REL. ATTY GEN. v. BROWN.

L. C. 131.

P. v. CAESAR (1855), 1 Parker C. C. 645.

The statute declaring a second offense of petit larceny to be punishable in the state prison is not applicable to a case in which the first conviction took place in another state. Crimes are local. One state does not enforce the criminal or penal statutes of another state. C. v. Green, 17 Mass. 514; Whittow v. Nashville R. R.

A statute may provide for increased punishment for habitual criminals. They are not *ex post facto*. C. v. Graves (1892), 155 Mass. 163, 16 L. R. A. 256, n.: cases.

P. v. CAMPBELL (1881), 59 Cal. 243, 43 Am. Rep. 257-263, 3 Cr. Law Mag. 29, § 334, Hughes' Proc.; § 313, Gr. & Rud.

Threats as an element in homicide cases. 1 Bish. C. L. 872; 1 Bish. Crim. Proc. 619-627; P. v. Garbutt (1868), 17 Mich. 9, 97 Am. Dec. 162-179, ext. n.; Campbell v. P. (1854), 16 Ill. 17, Hor. & Thomp. Cas. Self Def. 282 (1 Crim. Def.), 61 Am. Dec. 49-58, ext. n.; Clark, Crim. Cas. 267; Wilson v. S. (1892), 30 Fla. 224, 162 U. S. 466, 40 L. ed. 1039; Alexander v. S. (1888), 25 Tex. 260, 8 Am. St. 488, n.; S. v. Vallery (1895), 47 La. 182, 49 Am. St. 363; 1 Wigm. Ev. 110, 247; 198 (deceased).

P. v. CORNING: Sub L.C. 271.**P. v. CUNNINGHAM** (1845), 1 Denio, 524, 43 Am. Dec. 709-718, n.; Wood, Nuis. 265; cited, Cool. Torts, 730, Wood, Nuis. 18, 265, 847, Gould, Wat. 97, 105, 121, 1 Bish. C. L. 531, 1138, 1139, 2 id. 1274, 1275, Ang. Wat. 254, 563, 3 Gr. Ev. 184, McClain, C. L. (nuisance), 1173, 1184, 1186.

Cunningham stated: C. was occupying and running a distillery fronting on a street in Brooklyn, from which slops were sold and delivered to customers, whose access was on a public street. These operations caused the street to be thronged with "swill drivers," waiting to be served. They indulged in coarse and obscene language and crowded and fought for priority. Besides this there arose offensive odors which caused property to deteriorate. C. was indicted for obstructing the highway. He defended upon the ground that the distillery had been operated since 1810—the last thirty-five years—and that the business was conducted in as orderly a manner and with as little detriment to the public as could be under the circumstances; but his defenses were unavailing. *Held*, he was guilty of maintaining a nuisance for obstructing the public highway.

What constitutes a nuisance. St. Helen's Smelting Co.; Campbell v. Seaman, sub NUISANCE; *Sic utere*.

P. v. GATTY: Stenographic reports make faulty record matter. R. R. v. Stewart: 290a; § 12, Hughes' Proc.**P. v. HASTINGS**: L.C. 144.**P. v. JOHNSON** (1815), 12 Johns. 292; Laws, L. C. Simp. 293, 40 Am. Rep. 76, n.; cited, 2 Bish. C. L. 410, 441, 3 Gr. Ev. 83. § 346, Hughes' Proc.

Johnson stated: J. pretended to be an agent of T. to buy a pair of boots for

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him. T. N., the bootmaker, believing these representations, parted with the boots. *Held*, J. was guilty of false pretenses.

R. v. Naylor; Bowen v. S. (1876), 9 Baxt. (Tenn.) 45, 40 Am. Rep. 71-84, n. *False pretenses.* R. v. Wheatley: 19. False personation. 7 Am. & Eng. Encyc. Law. 695-698. Cheating. 3 Gr. Ev. 84-88; S. v. Mathews (1890), 44 Kan. 596, 10 L. R. A. 308, n.

P. v. LAWRENCE: 143 Cal. 148, 68 L. R. A. 193-223; § 294, Gr. & Rud.**P. v. MAYNARD**: L.C. 143.**P. v. MCCUMBER**: L.C. 110.**P. v. McDANIELS** (1902), 137 Cal. 192, 69 Pac. 1006, 92 Am. St. 81-159, ext. n. Conviction for lesser offense involves a greater. C. v. Roby: 74.**P. v. MOLINEUX** (1901), 168 N. Y. 264, 62 L. R. A. 193-357, ext. n. § 334, Hughes' Proc.; 12 Cyc. 406-412; 16 id. 1156; 21 id. 916.

System; collateral facts; evidence of other crimes in criminal case. Presumptions from the commission of another crime. *Res inter alios acta*, etc. See OTHER CRIMES; McClain, C. L.; S. v. Letourneau (1902), 24 R. I. 3, 96 Am. St. 697, n.; Manning v. S. (1901), 43 Tex. Cr. R. 302, 96 Am. St. 873; S. v. LaPage, 57 N. H. 245, 1 Am. Crim. Rep. 506, 582; Defrese v. S. *Malicious prosecution to show malice.* Cobbey, Replev. 1394: cases.

Cited, §§ 271, 272, 292, 294, Gr. & Rud.

P. v. MOORE (1877), 1 Idaho, 660-670. Assessment must be aptly made. Drew v. Davis; Fletcher v. Trewalla; P. v. Hastings.**P. v. REDINGER**: Sub FUGITIVES.

Cited, § 294, Gr. & Rud.

P. v. ROBEY (1884), 52 Mich. 577-581, 50 Am. Rep. 270-274, n.; stated, Mech. Ag. 746, 2 Beach, Pub. Corp. 1277; cited, 6 So. Dak. 212, 55 Am. St. 836. *Cited*, §§ 20, 179, 306, 309a, Hughes' Proc.; cited, §§ 293, 294, 298, Gr. & Rud.

Robey stated: Statutory crime. A statute commanded all persons to refrain from keeping open saloons on Sundays. A clerk, without the employer's knowledge or consent, but while he was on the premises, violated this law by opening the saloon to clean it, and meanwhile sold a drink of liquor to one soliciting it. *Held*, the principal was liable.

R. v. Almon; R. v. Bishop (1880), 5 Q. B. Div. 259; R. v. Dixon (1814), 3 M. & S. 11; 2 Beach, Pub. Corp. 1277: cases.

P. v. Robey is a fine discussion of the limitations of *Actus non facit reum nisi mens sit rea*. C. v. Weiss (1891), 139 Pa. 247, 23 Am. St. 182 (selling oleomargarine; intent no element). Ellis v. U. S.; Robey v. S. (1901), 94 Md. 61, 89 Am. St. 405: cases; Fox v. S. (1901), 94 Md. 143, 50 Atl. 700, 89 Am. St. 419, n. Good faith no excuse for violation of statutes. Sedgk. Stat. 79. Nor that one is actuated by laudable motives. R. v. Hicklin (1868), L. R. 3 Q. B. 360, 11 Cox, C. C. 19, 8 Rul. Cas. 60; P. v. Snowberger (1897), 113 Mich. 86, 67 Am. St. 449 (selling adulterated food). See R. v. Prince; C. v. Mash; S. v. Rogers (1901), 95 Me. 94, 85 Am. St. 395 (same as to sale of oleomargarine); R. v. Almon; U. S. v. Anthony.

Adultery; act and intent; intent immaterial. The crime of adultery is com-

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mitted, although defendant was ignorant that the woman was married. *C. v. Ellwell* (1840), 2 Met. 190, 2 L. C. C. (B. & H.) 290, 35 Am. Dec. 398; note, 83 Am. Dec. 655; cited, 3 Gr. Ev. 121. A man cannot be convicted of the crime of adultery who in good faith marries and cohabits with a woman whose husband has remained absent for more than seven years, without being heard from, and is believed by both parties to be dead, although in fact he is still living. *C. v. Thompson* (1863), 6 Allen, 591, 83 Am. Dec. 653-655, n.

Presumption of death from absence. *Nepean v. Doe, Smith, Lead. Cas.*; note, 83 Am. Dec. 655.

Crimes; intent. *Actus non facit reum nisi mens sit rea* does not apply to statutory crimes, where intent is not made a specific element. *C. v. Mash; Mahan; Reynolds v. U. S.*; *R. v. Prince*; *R. v. Hague*; *R. v. Tolson*. See *Ignorantia facti excusat*, etc.; "Intention," 8 Rul. Cas. 16-89. *Mens rea*; its doctrine. 14 Crim. Law Mag. 831-844. *Selling liquor to minors; absence of intent no defense.* *Carroll v. S.* (1885), 63 Md. 551, 7 Crim. Law Mag. 77; *S. v. Kittelle* (1892), 110 N. C. 560, 28 Am. St. 698-715, ext. n., 15 L. R. A. 694, n., 14 Crim. Law Mag. 874; *Snyder v. S.* (1888), 81 Ga. 753, 12 Am. St. 350, n. See *C. v. Stevens* (1891), 153 Mass. 421, 11 L. R. A. 357, n.; *S. v. Sasse* (1894), 6 So. Dak. 212, 55 Am. St. 834, n.

Game laws. Mere possession of game in violation of law constitutes the offense. *Phelps*: 191.

In acts *mala in se* the intent governs; but as to those *mala prohibita*, the sole question is, has the act been done? *Leggatt v. Priedeaux* (1895), 16 Mont. 205, 50 Am. St. 498 (illegal fees); *Meadowcroft v. P.* (1896), 163 Ill. 56, 33 L. R. A. 176.

P. v. ROGERS: L.C. 198.

P. v. SEYMOUR: L.C. 256.

P. v. TOWN OF SALEM (1870), 20 Mich. 452, 4 Am. Rep. 400, 9 Am. Law Reg. 487.

Sequestration of property under the form and in the name of taxation, for private purposes, cannot be done. *P. v. T. of S.*; *Allen v. Jay*; *Loan Ass'n v. Topeka*; *Taylor v. Porter*: 219a; *Cool. Const. Lim.* 652; *Oakley*: 222.

Cited, §§ 5, 352, *Hughes' Proc.*; §§ 5, 139, *Gr. & Rud.*

P. v. TURNER: L.C. 252. *Cited*, § 5, *Hughes' Proc.*

P. v. VERNON (1868), 35 Cal. 49, 95 Am. Dec. 49-76, ext. n. (*Res gestæ*; *Expressio eorum*, etc.)

Cited, §§ 203, 207, 338, 341, *Hughes' Proc.*; § 272, *Gr. & Rud.*

PEOPLE'S BANK v. CALHOUN: L.C. 12d.

PERCY MIN. CO. v. HALLAM (1895), 22 Colo. 233. Exceptions taken must be preserved in exceptions record; if in decree, they will be disregarded. The mandatory record cannot be burdened with the matter of the statutory record. *Percy v. Hallam*. See *Hume*; *Planing Mill Co.*: 2d.

Exception to a decree essential, and this must be shown in a bill of exceptions. *Lex neminem cogit*, etc., does not apply.

Not necessary to entry of judgment on verdict. *Legere v. Stuart* (1902), 17 Colo. Ap. 472.

PEREZ v. FERNANDEZ: L.C. 2e.

PERFORMANCE OF CONDITIONS:

Pleading of one may allege performance of conditions generally under codes; and at the trial under such allegations he may prove a waiver of the conditions. *Stephens*, 16 Utah, 22, 67 Am. St. 545, n.; *Foster*, 99 Wis. 447, 40 L. R. A. 833; 5 Cyc. 804-810 (bonds). What will excuse. *Cutter*: 308; *Robinson*: 309 (installment contracts). Prolivity is to be avoided. *Sturges*: 111.

Generally. 2 Bouv. Dic. 651-653; 1 Beach, Conts. 244-296; 3 Page, 1382-1392.

PERJURY: What constitutes. *R. v.*

Barker, 1 L. R. (1895), Q. B. 797, 9 Am. Cr. R. 421-425, n., 2 McClain, C. L. 852-895. 2 Bouv. 655, 656, And. Dic.; 2 Bish. Cr. Proc. 899-939; 3 Gr. Ev. 188-202; *S. v. Shupe* (elements of). Oath must be corrupt. *Sacramentum si futuum*, etc.

False, sham and mischievous pleadings are deceptions. See *CONTEMPTS*; *Graver*: 103; *Fabula*. Perjury vitiates judgments and decrees. *Barr*: 265; *Graver*: 103; *Ferguson*: 264; *Wonderly*: 102. As a ground of relief. *Graver*: 103.

False pleadings verified, is perjury. *Notes*, 70 Am. Dec. 637; 2 McClain, C. L. 859; *C. v. Kimball* (1871), 108 Mass. 473. False denials are. *Bliss*, Pl. 331a; 2 McClain, C. L. 859.

May be assigned upon false testimony going to the credit of a witness. *Wilson v. S.* (1902), 115 Ga. 206, 90 Am. St. 104, n., 2 McClain, C. L. 859, 860; 9 Am. Cr. Rep. 426.

Anyone delegated by the court may administer the oath. *S. v. Townley*: 225a; *Boni judicis*, etc.; 2 McClain, C. L. 875. Subornation of. 7 Am. Cr. R. 499.

PERPETUATING TESTIMONY: See

De bene esse; 2 Bouv. Dic.

PERPETUITIES: *Woodford v. Thelluson*. See *Alienatio*, etc. *Perpetuities* are odious in law and equity. See 2 Bouv. 658-660; And. Dic. *Walkerly, In re; WILLS*.

PERRINE v. BLAKE: See *Shelley's Case*.

PERRY v. PORTER: L.C. 136a.

PERRY v. WORCESTER (1856), 6 Gray, 544, 66 Am. Dec. 431-442, ext. n. (liability of a municipal corporation for the exercise of sovereign or governmental powers. *Sub Hill v. Boston*).

PERSONAL CONTRACT: Does not pass to representatives of deceased bankrupt. *Ans. Conts.* 235, 236. See *ASSIGNMENTS; DEATH*.

PERSONAL INJURY: *Buswell* on (1899); *Bailey*; 3 *Suth. Dam.* 1241-1258. Death from wrongful act. *Actio personalis*, etc. 2 *Kinlead, Torts*, 585. See *Squib Case*.

When assignable. See *Assignatus utitur*, etc.

Parties plaintiff and defendant: practice, procedure. See *Respondent superior*; *Busw. Pers. Inj.*, §§ 1-90, pp. 1-44. See *NEGLIGENCE; TORTS; DAMAGES*.

The litigation relating to this class of cases has become of much importance in the states and metropolises, like New York, Illinois, Pennsylvania, Massachusetts, Missouri and Texas. Entire volumes for these various jurisdictions are found, which in a few cases are general treatises, like *Buswell's Personal Injuries*. Other works are nothing more than mere index digests to certain sets of reports. Some of these local and provincial books almost

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reach the standards of general or elementary treatises; but they fall short in that they do not deal with broad definitions of tort and its cognate subjects of negligence, nuisance and the character of contract, often involved. They do not cite and elucidate the *Squid Case*, *Indemaur v. Dames*, *M'Manus v. Crickett*, *Farwell v. R. R.*, *Lynch v. Nurdin*, *Carter v. Towne*, *Vicars v. Wilcocks*, *May v. Burdett*, *Kearney v. London E. R.*: 211; *Stokes v. Saltonstall*: 207; *R. R. v. Lockwood*: 352, and such cases. The omission of such matters makes the performances "rivulet" works and often of the most misleading and really objectionable character, especially to jurists who view the law from higher standpoints; who fully appreciate the degradation the profession has suffered from the advertisement and the undue emphasis that have been given the "late case."

Reports of courts are confused and contradictory. Such are worthless. Digests founded on worthless reports may be likened to the house founded on the sand.

✓ **PENNESE v. GAFFNEY** (1896), 23 Colo. 245. Departures from rules of pleading are permissible in Colorado, and there, too, they may be waived. Hume. Still they are strictly construed for post litigation uses. Moynahan; Thomas: 15; Russell v. Shurtleff, q. v.

PETER v. COMPTON: L. C. 340.

PETERS v. FLEMING (1840), 6 Mees. & W. 42; Ewell, Lead. Cas. Inf. 56; Mews' E. C. L. 1343; Ryder, Thayer, Cas. Ev. 162; Craig, 18 Am. St. 569; 1 Chit. Conts. 196, 198, Smith, 310; 2 Gr. Ev. 365, 1 Pars. Conts. 21, 2 Page, 866, 867, 1 Mech. Sales, 130, 132, 2 Benj. 26, 2 Kent, 239 (infants); contracts for necessities). See INFANTS.

Cited, § 69, Hughes' Conts.; §§ 281, 305, Gr. & Rud.

Infants; liability for necessities. "Necessaries for infants are such things as it is reasonable that they should have," and for these only are they liable in contract.

1 Chit. Conts. 194-196, 2 Gr. Ev. 365, 366; Ryder; Porter v. Powell; Kilgore, 83 Me. 305, 12 L. R. A. 859, n.; Askey, 74 Tex. 294, 5 L. R. A. 176, n.; 2 Beach, Conts. 1366; Gayle, 79 Va. 242. *Necessaries; what are.* 2 Gr. Ev. 365-366; 2 Benj. Sales, 26.

Husband must support wife even after divorce, and after allowance of statutory alimony. Edgerton, 12 Mont. 122, 16 L. R. A. 94, n.

Ryder v. Wombwell (1868), L. R. 4 Exch. 32, overruling L. R. 3 Exch. 90, 37 L. J. Exch. 47; Thayer, Cas. Ev. 162, Finch, Cas. 379, Keener, Sel. Conts. 531, Ans. Conts. 111 (infant's necessities); 1 Mech. Sales, 130, 132, 2 Benj. 27, 1 Rand. Com. Paper, 269, 1 Pars. Conts. 323, 1 Chit. 195, Bro. Max. 533, Bish. 909, 922, 2 Page, 866, Smith, 309; Whart. 64, 69, 70, Add. 158, 2 Kent, 240, n. 2 Beach, 1366, Mews' E. C. L. Harrison v. Fane, 1 M. & G. (39 E. C. L. R.) 550.

Infant not liable upon contract except for "necessaries." A silver goblet and a pair of studs are not necessities. 1 Add. Conts. 156-160; 1 Benj. Sales, 27.

Necessaries for an infant husband's wife

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and child are necessities for himself. Smith, Conts. 315. Father not liable for son's tutoring during vacation. Peacock, 22 R. I. 328, 53 L. R. A. 192, n. *When liable for attorney fees.* Crafts, 24 R. I. 397, 96 Am. St. 721-735, ext. n. *Peters*; Simpson, 184 Mass. 348, 100 Am. St. 560, n. (contract for voidable, not void).

Whether or not there is any evidence or sufficient evidence for a jury to pass on, is a question for the judge. Ryder; Bro. Max. 110. *Ad questionem facti*, etc. See distinctive rule in criminal cases; S. v. Croteau: 271; Schick v. U. S.; Bonnell: 185.

PETITION: See COMPLAINT; STATEMENT OF CLAIM. Its requirements. Max. Code Pl. 73-120; CAUSE OF ACTION.

PETITION OF RIGHT: 2 Bouv. 664; And. Dic. Sub Hunsaker: 259, 21 Rul. Cas. 184-222, Bro. Max. 59. It is not established in America. 8 Rul. Cas. 268, n.

PETTIBONE v. NICHOLS (1906). 203 U. S. 192-222.

Haywood, Moyer and Pettibone were citizens of Colorado, wherein labor organizations, in attempting the establishment of laws, had met a long series of defeats at the hands of legislatures, courts and governors. They were sometimes unable to persuade the legislature, and when they did, the enacted bills would be stolen after the legislature would adjourn, and before the law was published. At succeeding sessions, the bills would be enacted, then the courts would declare them unconstitutional. Jugglers with state power on the one hand and leaders of labor on the other finally brought on their natural, direct and probable results, namely, civil war in Colorado, and the establishment of martial law in certain districts wherein, without any legal ceremony whatever, train loads of miners would be transported from the state and emptied in extraterritorial and remote deserts. *Silent leges inter arma.* This desperate warfare raged throughout several western states. Governor Stunenberg of Idaho was killed with a bomb in 1905. This assassination was confessed by one Orchard, who implicated Haywood, Moyer and Pettibone, citizens of Colorado. The lawlessness of the governors of Idaho and Colorado in kidnapping the accused and abducting them from Colorado may be gathered from the report, 203 U. S., and especially from Justice McKenna's dissenting opinion. Confessedly, the extradition facts were sham and false, indeed they were pure and un-

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adulterated perjury, and necessarily so appeared from the record. However, the appeal to courts to set aside process founded on conspiracy, perjury and outlawry was not only uniformly and constantly refused, but almost appeared as an element of acceptability. The case is a denial of the maxim *Ex dolo malo non oritur actio*. It is also an enlargement of *Boni judicis est ampliare jurisdictionem*. It stands for a rule that a state may acquire jurisdiction over foreigners by crime, fraud and violence for criminal prosecution. See Dunlap: 168; Hsley: 169.

Salus populi suprema lex in the case is made to read thus: It is for the welfare of the public that accused persons be prosecuted by means of fraud, conspiracy and crime; that by means of these, they may be imported and tried before courts who overlook jurisdictional facts founded on palpable shams and myths.

Lex non vetat permittit applies to governors and their contributions to the due administration of the laws. Conclusive presumptions of right and authority are due them. See Mostyn: 274.

Justice McKenna spoke for the prescriptive constitution, also for the principle, *Ubi jus ibi remedium*. He contended that the substantive right depended upon the remedy, and if this was denied the right fell. Also, that one had the natural and inalienable right to abide in his own country unless removed therefrom upon due process of law; that the latter could never find support upon covin and subterfuge, upon judicial shams, frauds and mockeries; that the forms of the law and its *bona fide* administration is a part of the law.

Extradition. Moyer, *In re*, 12 Idaho, 250, 118 Am. St. 214.

In a notable convention (Republican, 1908) these words were declaimed in defense of the judiciary from insidious attacks by powerful and influential sources, intimating usurpation and abuse of power. We quote:

"This great department of justice, this federal judiciary, constitute the conservative and restraining force which holds the government to its true course, and there should be no sympathy with that spirit which would divest the courts of their constitutional powers or impeach their integrity.

"The courts are the safeguard of the individual and of the republic. If constitutional and civil liberty should ever be imperiled in this country and driven to bay they will find their true refuge and defense within the impenetrable fortress of the supreme judiciary of the United States."

PISTER v. WADE (1886), 69 Cal. 133. Counter-claims call for a hearing without more defense matter.

PEELPS v. BACNY: L.C. 191.

PHILADELPHIA, ETC. R. R. v. DIBBY (1852), 14 How. (U. S.) 468, 14 L. ed. 502; Thomp. L. Cas. Pass. 31, 1 Am. Law Reg. (O. S.) 397, Pars. Conts., Chk., Bish.; Cool. Torts.

Common carrier; liability for injury to free passenger. R. v. Lockwood: 352.

PHILIPPINE ISLANDS: Constitutional relations of to the United States. De Lima v. Bidwell (1900), 182 U. S. 1; Downes v. Bidwell (1900), 182 U. S. 244. *Jury trial not accorded*. Dorr v. U. S. (1904), 195 U. S. 188 (Harlan, J., dissents); Hawaii.

Whence due process of law is reckoned for. Paralso v. U. S.

PHOTOGRAPH: 2 Bouv. Dic. 665-667. As evidence. Baustian v. Young (1899), 152 Mo. 317, 75 Am. St. 462-479, ext. n.; S. v. Matheson, 130 Ia. 440, 114 Am. St. 427-442, ext. n.

PHYSICAL EXAMINATION: See *Res ipsa loquitur*; *Discovery*; 2 Bouv. Dic. 667-669.

Courts will not order. Austin R. R. v. Cluck.

PHYSICIAN: His professional status. Ans. Conts. 105; 2 Bouv. Dic. 669-671. Formerly could not recover fees. Bro. Max. 746 n.

May chose his patients. Hurley, 156 Ind. 416, 53 L. R. A. 135.

Physician's right to determine frequency of visits to patient. Ebner, 186 Ill. 297, 57 L. R. A. 298, n.

Liability of physicians and surgeons for negligence and malpractice. Gillette, 67 Ohio, 106, 93 Am. St. 639-670, ext. n.; McClain, C. L.; Henslin, 91 Minn. 219, 64 L. R. A. 126; cases; 70 L. R. A. 49.

PICKARD v. SHARS (1837), 6 Adol. & El. 469 (33 E. C. L. R.), 2 N. & P. 488, 11 Rul. Cas. 78-104, n., Bro. Max. 29, 7 Robin. Prac. 430-471, Keener, Sel. Conts. 763, 2 Pom. Eq. 804, 2 Beach, 1092-1096, Bisph. 284, Bro. Max. 291, 292, Sto. Ag. 91, 1 Gr. Ev. 204, Ang. Wat. 237, Bigel. Estop., 2 Best, Ev. Mews' E. C. L., Brown, Jurisdic. See *Horn v. Cole*; *EQUITABLE ESTOPPEL*; *Freeman v. Cooke*; Finch, Cas. 483; *Lofus v. Maw* (trust coupled with an interest); *Mitchell v. Reed* (inconsistent conduct); *Kingston's Case*, 2 Sm. Lead. Cas., Bigel. Fraud, Pars. Conts., Bish., Chit., Add., Whart. 6, 249, Smith, 26, 27; Wash. Real Prop., Whart. Ag., Reinh. 90, Huffc.; Whart. Ev., Benj. Sales, 1 Kent, 483, 484, 40 L. ed. (U. S.) 745. See *Swan Case*, sub *Hibblewhite*; *Ewart on Estop.*, q. v. Cited, §§ 107, 177, 181, 182, 184, Hughes' Proc.; §§ 171-174, 180, 185, 289, 295, Gr. & Rud.

PIERCE v. SARIN (1858), 10 Cal. 22, 70 Am. Dec. 692; Pom. Rem. 702. New matter defined, and nature of stated; and it must be pleaded under codes. McKyring: 33; P. v. McCumber: 110; J'Anson: 91; Kollock. § 145, Hughes' Proc.

Issues essential under codes to give notice and also for economy; for these ends issues must be limited, certain, and also narrow proofs. See **ADMISSIONS**; Bliss, Pl. 138; Adams v. Gill; 2 Best, Ev. 232; **PLEADING**.

Res adjudicata grounds of recovery and defenses must be pleaded, even in a trespass case, where it is set forth under general allegations and general denials. Piercy.

Defenses; one may plead as many as he

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may have. *Piercy*; *Bell v. Brown*; *Nemo prohibetur plures negotiationes sive artes exercere*. But not sham defenses, nor sham denials. *Piercy*; *Dickson*; *Robinson*: 45. Sham denials obnoxious. *Piercy v. Sabin*; *Graver*: 103. Sham answers and denials may be stricken, on motion. *Piercy*; *Graver*: 103; *P. v. McCumber*: 110.

The general issue defined; it is not permitted under codes. The object of a code is to abolish the general issue. *Piercy*. Conclusions of law state no cause of action. *Piercy*; *Mallinckrodt*: 12a; *Cruikshank*: 232; *Acts of the Apostles*, chs. 22, 25, 26; *Green*: 90. Ejectment; proofs in cases of. *Piercy*; *Bell v. Brown*; *Kollock*. See PLEADINGS.

PIGOT'S CASE: See ALTERATIONS; *Master v. Miller*: rules. It supports the general rule except that the owner must not make any alteration whether material or immaterial.

Pigot's Case is also widely cited to the point that a contract may be void in part and valid in part. *Osgood*; *Mallan*: 373; *Sprague*: 236.

If only one of several parts of a contract is read to an illiterate or a blind person then only such parts as are read are valid; the unread parts are void. But if any part of a contract is materially altered this renders the entire contract void. *Hazleton v. Shekells*.

A valid ground of recovery is sought and preferred to an *in pari* defense. *Brennan*, 73 N. J. L. 729, 118 Am. St. 727.

PINNINGTON v. GALLAND (1853), 9 Ex. 1-13, 10 Rul. Cas. 35, 20 Eng. Law & Eq. 561, Bro. Max. 580; *Hall v. Lund* (1863), 1 Hurl. & Colt. 676, 10 Rul. Cas. 46; *Mews' E. C. L.* 1095; *cited*, § 147, *Hughes' Conts.*

Ways of necessity, as incidents, attach to streets and passages. Note to 37 L. ed. (U. S.) 156, 3 Kent, 421, 424; *Pearson*, 1 B. & S. 571 (101 E. C. L. R.). The right to use a drain attaches by implication to the grant of a house. *Pyer v. Carter*, 1 H. & N. 916 (which "went to the utmost extent of the law"); *Bro. Max.* 481. Selling land entirely surrounded by land of grantor gives implied ways of egress and ingress. *Grafton*, 130 N. Y. 465, 27 Am. St. 533, n.; *Whitehouse*, 83 Me. 91, 23 Am. St. 756, n. (plats: illustrations); 2 Bro. & Had. Comm. 43, n., 210, 2 Gr. Ev. 658, 2 Warv. Vend. 558, Moak, Torts, 488-500, 1 Add. 120, Bro. Max. 479, 102 Am. St. 109-112.

Deeds; description; boundaries. Bounding a parcel of ground in a deed with reference to a road annexes such road as an incident. *Roberts v. Karr* (1809), 1 Taunt. 495; *Story v. N. Y. El. R. R.* Or a street. *Durkin v. Cobleigh* (1892), 156 Mass. 108, 32 Am. St. 436, n., 17 L. R. A. 270; *Moose v. Carson* (1889), 104 N. C. 431, 17 Am. St. 681, n., 7 L. R. A. 548. Grant of means to accomplish ends. *Chicago v. Stratton* (1896), 162 Ill. 494, 53 Am. St. 325; *S. v. Conlon* (1895), 65 Conn. 478, 48 Am. St. 227; *McCulloch*: 147; *Young v. Raincock* (estopped by deed). See *Expressio eorum*, etc.

Ways of necessity end with the necessity. *Holmes v. Gorings* (1824), 2 Bing. 76 (9 E. C. L. R. 324), 9 Moore, 166, *Mews' E. C. L.* 2 Wash. R. P., 10 Rul. Cas. 56, 19 Conn. 387, 373; *Pierce v. Selleck* (1847), 18 Conn. 321, 327; cases, 2 Wash. R. P. 1236, Warv. Vend. 653.

Pinnington v. Galland.—

Rights and obligations of parties to private ways. *Dudgeon v. Bronson*, 159 Ind. 562, 90 Am. St. 315-330, n.

PIPER v. PEARSON: L.C. 114.

PIRACY: 2 Bouv. 673-675; *And. Dic.*; sub R. v. McGrath.

PIRTLE v. S. (1849), 6 Humph. (Tenn.) 663, 2 Crim. Def. 645; *stated*, Laws, Insan. Cas. Simp. 645; *cited*, 1 Bish. C. L. 409, 2 Crim. Def.

Drunkenness mitigates crime where statutes make degrees dependent upon intent. *Pirtle*. This case concedes great powers to legislatures. *Lex non excoct*, etc. *Drunkenness*; when a defense. *U. S. v. Drew*; *P. v. Rogers*: 198.

PITTSNOGLE v. C. (1895), 91 Va. 808, 50 Am. St. 867. Defects of spelling, not misleading in sound, do not vitiate. *Pittsnogle*. *Contra*, *Moynahan* (Colo.).

PLACITA (PLACITUM): Essential for record proper in appellate court. *Skinner*; *Stubbings v. Evanston* (1895), 156 Ill. 338. It is necessary to show that the proceedings were *coram iudice*—must correspond with the bill of exceptions as to who tried the case. *Stubbings, ante*. Must exist, and omission of, cannot be aided by statutory record. 1 Freem. Judg. 77; *Planing Mill Co.*: 2d. Essential for a record. *Planing*: 2d; § 229, Gr. & Rud. *Plaintiffs are charged with making a record proper, the mandatory record*. *McArthur*: 99; *Conductors', etc. Ass'n*: 294; *Garland*: 60. See APPELLATE PROCEDURE. Record without *placitum* offered to prove judgment where it is in issue, must be objected to. *Hyde v. Heath* (1874), 75 Ill. 381. See *Planing*: 2d; *Clem*: 2c; EXECUTION SALE.

PLACITA NEGATIVA DUO EXITUM non faciunt: Two negative pleas do not form an issue. *Loft*: 415. See *Negatio*, etc.; *DENIAL*; *Positio*, etc.

PLANING MILL CO. v. CHICAGO: L.C. 2d. *Cited*, §§ 59, 101, 118, 124, 124a, 138, 165, 175, 198, 201a, 203, 210, 224, 229, 236, 243, 269, 272, 278, 279, Gr. & Rud.

PLEA: Bad in part, bad in toto. *Rison*: 253; 1 Chit. Pl. 546; *Fox v. S.* (1899), 89 Md. 381, 73 Am. St. 193, n. See ILLINOIS.

Each must be perfect in itself. *R. v. Waters*: 71; *R. v. Waverton*: 70. Is construed against the pleader. *Ambiguum*. Generally: 2 Bouv. 677-680; *And. Dic.* *Form of*. 2 Post. Fed. Prac. 1306.

PLEADINGS: General resume; maxims: cases. §§ 272-279, Gr. & Rud. INDICTMENTS: maxims, rules; RATIONALE; JURISDICTION; Ignorantia; CODES.

Definition; observations. §§ 147, 169, 225, 273-279, Gr. & Rud.; *C. v. Roby*: 74; *Adams v. Gill*; CERTAINTY; CONSERVING PRINCIPLES. Confer jurisdiction. §§ 57-61, 88, 118, 144, 147, 169, 170, 225, 237-256, 273-279, Gr. & Rud. See JURISDICTION. Waiver; observations. §§ 57-59, 118, 124, 136, 147, 237-240, 248-249, 273, Gr. & Rud. Are constitutional requirements. §§ 14, 56-61, 88-90, 118, 135-140, 144-148, 152-153, 157, 237-256, 273, id. Judgment depends on; pleadings attend it to prove estoppel or title. §§ 124, 127, 149, id.; *Clem*: 2c. Judgment; implies the record foundation. §§ 126, 149, 225, id.; *Clem*: 2c. It includes judgment roll. §§ 120, 127, id.; *Clem*: 2c. Uses of, not understood. §§ 118, 147, 152, 157, 225, 237-238, id.

Are to limit issues and narrow proofs. §§ 272, 277, Gr. & Rud.; *Kollock*; *Sache*.

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See THEORY; VARIANCE; *Verba fortius. Statutes cannot abolish.* §§ 112-119, 274, Gr. & Rud.; Huntsman: 231; R. v. Wheatley: 19; C. v. Roby: 74; Sache. See CONSERVING PRINCIPLES; CONSTRUCTIVE NOTICE; PRESCRIPTIVE CONSTITUTION; CODES; INDICTMENTS; JURISDICTION.

Maxims of, from the prescriptive constitution. § 116, Gr. & Rud.

Important section relating to. § 119, Gr. & Rud.; INDICTMENTS.

The record or constitutional rule: De non apparentibus, etc. See CODES; CONSTRUCTION.

The mystic rule: Verba fortius accipiuntur contra proferentem. See CODES.

The coram iudice rule: A court is bound by its record. Frustra probatur quod probatum non relevat. See CODES; CONSTRUCTION; JURISDICTION; Sache; Munday: 79.

Definition. Pleadings are the juridical means of investing a court with jurisdiction of a subject-matter for its adjudication. Windsor: 1, and following cases: U. S. v. Cruikshank: 232; Sache; INDICTMENTS; JURISDICTION. § 273, Gr. & Rud. See Bliss, Pl. 135, 138; 2 Bouv. 680, 682; And. Dic.; §§ 21, 23, 65, 79-81, 224, Hughes' Proc. See Adams v. Gill; CERTAINTY; CONSERVING PRINCIPLES.

Subsidiary to that leading function they have many somewhat ancillary uses which may be gathered from different titles of this work. See CONSERVING PRINCIPLES OF PROCEDURE; JURISDICTION; COLLATERAL ATTACK; *Res adjudicata*; CONSTRUCTIVE NOTICE; MANDATORY RECORD; *Necessitas inducit privilegium*; NEGLIGENCE; ISSUES; ADMISSIONS; DENIALS; PROVINCE OF COURT AND JURY; RIGHT TO BEGIN; ORDER OF PROOF; RELEVANCY OF EVIDENCE; ARGUMENT; MATERIALITY OF THE ISSUE; ORAL EVIDENCE; Weltmer: 268a (to show that a lawful subject-matter was presented for the court to act upon. This may subsequently be inquired after); Beaumont: 367; Clem: 2c. They are to give notice, limit issues, narrow proofs and limit jurisdiction. Camp v. Bank, 44 Fla. 497, 103 Am. St. 173. See IDENTIFICATION; C. v. Roby: 74; cases.

Functions of, in proving title. §§ 124-132, Gr. & Rud. Or an estoppel of record. §§ 171-200, 248, Gr. & Rud. Ignorantia.

When had in substance. §§ 248, 249, Gr. & Rud. See CODES; COLLATERAL ATTACK; CONSTRUCTION; *Coram iudice*; Sache.

"What ought to be of record must be proved by record and by the right record" is one of the conserving principles of procedure, the elucidation of which involves the mandatory record and all its essentials. This basic rule must be considered in connection with oral evidence and *Res adjudicata*. Where a record is required, it must exist and be sufficient, otherwise the above basic rule fails.

See *Res adjudicata*; *Expressio unius; De non apparentibus*. Pleadings are a constitutional implication. §§ 7-12, Hughes' Proc. See ALLEGATIONS; CAUSE OF ACTION; JURISDICTION.

There are phases of the following maxims that are often disclosed by the cases,

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namely: *Salus populi suprema lex; Necessitas inducit privilegium, etc.; Summa ratio est quæ pro religione facit; De non apparentibus, etc.; Frustra probatur quod probatum non relevat; Debile fundamentum fallit opus; Quod ab initio non valet in tractu temporis non convalescet; Ignorantia legis neminem excusat; Verba fortius accipiuntur contra proferentem; Consensus tollit errorem.* Other maxims are mentioned and cited in reference to cases illustrating their application. Vol. III, DATUM POSTS.

In a constitutionalism a court is bound by its record. Therefore its laws minutely provide how that record must be made and kept; codes always so provide, and most minutely so. Pleadings are a part of that record, and they are just as sacred and indispensable as any part thereof. They cannot be waived. Where courts are not bound by their records, there they take on the ways and means of absolute or arbitrary power. (See Windsor: 1; CONSTITUTIONALISM; INDICTMENTS; JURISDICTION.) Consequently the rule that a court is bound by its record is of higher origin than is popularly ascribed for it. For protection the rule is as strict in the civil as it is in the criminal case.

1 Gr. Ev. 65; Sto. Eq. Pl. 10; Harrison v. Nixon, sub Garland. *Frustra probatur.*

Pleadings are generally defined to be the mutual altercations of the respective parties, in writing, to raise a single issue upon the record. Generally, cases define them as a means to give notice to the adverse side, and to this is sometimes added: to inform the court of what is to be tried. See Adams v. Gill; Lockhart v. Leeds (1904), 195 U. S.; Rensberger v. Britton; 2 Thomp. Trl. §§ 2310, 2311; 1 Bates, Pl. Pr., Parties and Forms, 511, 512; And. Steph. Pl., § 230; cases, 2d ed. Sometimes there is added another function: to limit issues and to narrow proofs. Bliss, Pl., § 138; Kollock; Adams v. Gill. §§ 21, 23, Hughes' Proc. See IDENTIFICATION; Ignorantia.

In some criminal cases, the uses of the record for *res adjudicata* are sometimes mentioned. Moynahan; Cruikshank: 232; Huntsman v. S.: 231. See Russell: 27; cases. But it should be impressed and understood there is no difference in civil and in criminal pleadings, when they are viewed from requirements of the conserving principles of procedure. Pages 8-32, Hughes' Proc.; 1 Gr. Ev. 33-65; 2 id. 7; 3 id. 10; Sto. Eq. Pl. 10; Harrison, sub Garland: 60. *Frustra probatur* applies to all systems alike. 1 Ell. Ev. 143; 1 Best, Ev. 253; *De non apparentibus, etc.* See LITERATURE; MAXIMS.

Next follows one of the definitions widely accepted and studied:

“§ 281: *Of pleadings.* These mutual allegations are called the pleadings. Their object is to apprise the court of the exact point or points concerning which its judgment is desired. In order to secure this object, numerous technical rules concern-

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ing them have been from time to time adopted tending to certainty, clearness and brevity, in the statement of the real material issue. The discussions and illustrations of these rules form the subject-matter of the treatises on pleadings. Read 3 Bl. Com., pp. 293, 310-313; 1 Chit. Pl. 213, 214, 221-239; Steph. Pl., pp. 123-137, 240-426; Gould's pl., chap. I, §§ 1-3; chap. III; chap. VIII, §§ 1-31, 65-79." Robinson's El. Law.

This definition omits many important matters. See §§ 83-123, Gr. & Rud., Vol. I; also §§ 171-261, *id.*; also THEORY OF THE CASE; VARIANCE; *Verba fortius*; WAIVER.

Certainty cannot be abolished. L.C. 5-28; 231, 232. Pleadings must describe and present a subject-matter to be adjudicated. *Res adjudicata* and other conserving principles require this. INDICTMENTS. Legislative power to destroy these matters and such functions cannot be conceded from constitutional viewpoints, therefore there are limitations of the powers of a court to authorize variances and departures in any kind of a case. Cf. *Moynahan* (Colo.). See VARIANCE; DEPARTURE.

Facts, not conclusions of law, must be pleaded. *Necessitas inducit privilegium*, etc.; J'Anson: 91; Cruikshank: 232.

Legislatures cannot make conclusions of law sufficient pleadings. P. v. Turner: 252. A conclusion of law describes nothing, and therefore if made or declared sufficient, then pleadings may be wholly dispensed with. *Cessante ratione legis*, etc.; J'Anson: 91; Huntsman: 231. Description of a certain subject-matter is essential for the highest policies and integrity of the most important subjects of the law, from which pleadings should be deductively viewed and as essentials or principal things. See SUPREME LAW OF THE LAND; *Necessitas inducit privilegium*, etc. §§ 59-61, Gr. & Rud.

Pleadings viewed from estoppel, Res adjudicata and collateral attack. §§ 171-261, Gr. & Rud.

Courts cannot proceed without pleadings. Munday: 79; *Sache v. Wallace*; *Baez, Ex parte* (1900), 177 U. S. 378; *Illinois Central R. R. v. Adams* (1901), 180 U. S. 28; *Mitchell v. First Nat. Bank*, *id.* 471; *Mountain View Co. v. McFadden*, *id.* 533 (resort cannot be had to judicial knowledge to raise controversies not presented by the pleadings). *De non apparentibus*, etc.; *Debile fundamentum*, etc.; *Fabula non iudicium*; Windsor: 1. See COLLATERAL ATTACK; CONSTRUCTIVE NOTICE; JURISDICTION; PLEADING; PROCEDURE. *Contra* cases are found: 2 Cyc. 689-691. See THEORY OF THE CASE; 2 Thomp. Trl., §§ 2310-2311; 1 Bates' Pl., Prac., Parties & Forms, 511-512.

Pleadings are essential to impart constructive notice, and in this third persons, indeed the whole public, are interested. *Salus populi suprema lex*. Consequently pleadings cannot be waived. Two cannot waive nor dispense with the rights of a third. *Res inter alios acta*; *Id quod nostrum*. Thus it will be seen how judgments and many other contracts are directly and vitally affected by pleadings and records, and why these must be considered by contracting persons, just as much, at least, as they must look after the infirmities of the note, bill or deed,

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or any other contact. Therefore, it is well sufficiently to present the foundations of a judgment as of other contracts and from that viewpoint. Notes to Lampleigh: 301. §§ 28, 30, Hughes' Proc.

Certain pleadings are essential to determine what cause of action merged into the judgment. This is often an important inquiry. Weltmer: 268a; Beaumont: 367. See LITERATURE.

Construction of, is always strict. Dovaston: 217; *Verba fortius*; CERTAINTY; CODES; CONSTRUCTION; *Ignorantia*; § 14, Gr. & Rud.; INDICTMENTS; *Ignorantia*; Moore v. C. They are not construed liberally at the beginning to acquire jurisdiction, and strictly at the end to defeat it. Notes to Lampleigh: 301. §§ 28, 30, Hughes' Proc.; *Res adjudicata*; COLLATERAL ATTACK.

Pleadings essential to confer jurisdiction—authority to proceed—upon a court. Munday: 79; *Fabula*; 180 U. S. 28; 471, 533, p. 472. They serve other and much higher purposes than to "raise an issue," to "limit proofs" and to "give notice." See IDENTIFICATION; ALLEGATIONS; *Res adjudicata*; JURISDICTION. Those trite and commonplace expressions have largely contributed to the views now abroad, that pleadings, "like any other notice," may be waived. 2 Thomp. Trl. 2310, 2311; 1 Bates' Pl., Pr., Parties & Forms, 511, 512; And. Steph. Pl. 230; cases, 2d ed. See INTRODUCTION, also §§ 65, 79, 81, 224, Hughes' Proc.

Due process of law requires pleadings. Louisville, etc. R. R. v. Schmidt (1900), 177 U. S. 230; Fayerweather, *sub Res adjudicata*; Windsor: 1.

Pleadings ought to be true. § 15, Hughes' Proc.; Pain: 107.

Removal of causes also require certain pleadings. Houston R. R. v. Texas (1899), 177 U. S. 66 (statement of cause must be in complaint). Purpose of. §§ 22, 28-30, 39, 40, 45, 90-103, 125, 131, Hughes' Proc.

Generally: See INTRODUCTION; §§ 1-50, Hughes' Proc.

PLEDGE: Pledgee may sell pledge, when. *Moses v. Granger* (1900), 106 Tenn. 7, 59 L. R. A. 857-867, ext. n. *Generally:* 2 Bouv. Dic. 683-688; Schoul. Bailm.

POLACK v. POCHE (1868), 35 Cal. 416, 95 Am. Dec. 115-125. *Accidents; when tenant must rebuild.* Hallett: 308d. Cited, §§ 297, 302, Hughes' Proc.; § 69, Gr. & Rud.

POLHILL v. WALTER: (Agent warrants his authority. Parties liable on agent's contracts): L.C. 411.

POLICE POWER: Freund on. Mc-Clain, C. L.; McQuillin's Munic. Ordinances; Tiede; Howe's Civil Law, 172-174. Cited, §§ 44-47, 50, 140, Gr. & Rud.

MAXIMS AND LEADING CASES: *Salus populi suprema lex*; *Sic utere tuo*, etc. *Millett v. P.*: cases; *Barbier v. Connolly*; *Millett v. Horton*; *Mugler*; P. v. Turner: 252; *Bartemeyer*; *Austin v. Tennessee*; *Evansville*; *Slaughter House Cases*; *Fertilizing Co.*; *Rahrer*; *Bailey v. P.* (1901), 190 Ill. 28, 83 Am. St. 116; 67 Cent. L. J. 3-8.

Limitations of power to interfere with procedure. Indianapolis: 223; cases; L.C. 217-232; cases; Graver: 103. See PLEADINGS; MANDATORY RECORD; CONSTITUTIONAL LAW; *Necessitas inducit privilegium*; THEORY OF THE CASE; VARIANCE; *Verba fortius*; WAIVER.

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Limitations of power to interfere with contracts. Millett v. P.; § 3, Hughes' Conts.; S. v. Chapman (1900), 56 S. C. 420, 76 Am. St. 557 (violating a contract may be declared a crime); R. v. Conde: cases; *Pacta conventa*, Preface Hughes' Conts.; International Co., 160 Ind. 349, 98 Am. St. 334 (interdicting assignment of future wages valid); *Holden v. Hardy* (1898), 189 U. S. 366; Mauldin, 53 S. C. 285, 69 Am. St. 855; 185 Mass. 18, 102 Am. St. 322; Quarg, 149 Cal. 79, 117 Am. St. 115.

Hours of labor; regulation of. P. v. Orange Co. (1903), 175 N. Y. 84; Boyce (1904), 27 Nev. 289, 65 L. R. A. 47, ext. n.; Ellis v. U. S.

What may be declared a crime. Barbier; P. v. Turner, 252; Bland v. P. (1904), 32 Colo. 80, 105 Am. St. 80; S. v. Brown, 37 Wash. 97, 107 Am. St. 798, n. Sale of milk from cows fed on slop. Sanders, 117 Ky. 1, 111 Am. St. 219, 65 L. R. A. 424 (statute may interdict use of a docked horse for public morals); S. v. Missouri, 167 Mo. 489, 90 Am. St. 426, n. (what acts may be declared criminal); Horwich, 205 Ill. 497, 98 Am. St. 254 (must involve morals, safety or welfare); Booth v. P. (1900), 186 Ill. 43, 78 Am. St. 229-274, ext. n.; S. v. Biggs (1903), 133 N. C. 729, 98 Am. St. 731-758, ext. n., 64 L. R. A. 139 (Christian Science—Osteopathy); Powell v. C. (1886), 114 Pa. 265, 7 Am. Cr. Rep. 32-58, ext. n.; S. v. Sopher (1903), 25 Utah, 318, 60 L. R. A. 408 (may prohibit barbering); Janin v. S. (1901), 42 Tex. Cr. Rep. 631, 96 Am. St. 821, n.; Reduction, 199 U. S. 306-325, citing Barbier, Mugler and Crowley; Viemeister, 179 N. Y. 235, 103 Am. St. 859, n. (limitations); Toney v. P., 141 Ala. 120, 109 Am. St. 23-26; Butte, 3 Mont. 18, 104 Am. St. 690.

To declare what is a tort. See NEGLIGENCE; LEGISLATURE.

Power of states to regulate conduct. P. v. Turner, 252. Of school boards to suspend pupils, etc., *sub* Hill v. Boston; Blue, 155 Ind. 121, 80 Am. St. 195-234, ext. n.

Limitations of power to interfere with property. Thorpe, Sharpless, Loan Ass'n Cases; Stockdale, 277; Rison, 253; Miller v. Horton: cases; Fisher v. McGirr; Ross, 83 Ark. 176, 119 Am. St. 131-136; Sentell, 166 U. S. 698; Lawton, 152 U. S. 133 (to destroy property from necessity).

Right to pursue one's own true and substantial happiness. Ruhstrat v. P. (1900), 185 Ill. 133, 76 Am. St. 30, 49 L. R. A. 181, 12 Am. Cr. Rep. 353-465, n. (one's right to choose his occupation. To advertise by the flag; 67 Cent. L. J. 3-8); Paltrovich, 3 Mont. 18, 104 Am. St. 698.

Commerce; power of states over. Rahrer; Bartemeyer; Lelsey; Austin v. Tennessee; Fox v. S., 89 Md. 381, 73 Am. St. 193, n. (may forbid manufacture of oleomargarine); S. v. Broadbelt (1899), 89 Md. 565, 73 Am. St. 201, n. *Bartemeyer* (1873), 18 Wall. (U. S.) 129, 21 L. ed. 929, 13 Am. Law Reg. (N. S.) 220-230; Brown, Jurisdic.; Rhodes, 170 U. S. 412 (regulating intoxicants); *Lelsey v. Hardin* (1890), 135 U. S. 100, 34 L. ed. 128; Boyd, Cas. Conts. Law, 269, 2 Thayer, Const. Cas. 2104, And. Dic. 825; Rahrer; Austin.

Rights, privileges and immunities; what are. Include rights to sue. *Sub* Mostyn, 274.

Building regulations; constitutionality of one's right to build, and as he pleases,

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upon his own property. Bostock, 95 Md. 400, 93 Am. St. 394-411, ext. n. See MALICIOUS ACTS.

Offenses prescribed under general police power and municipal ordinances. McClain, C. L. 23-73. See NEGLIGENCE. *Constitutional limitations.* McClain, C. L. 74-80, S. v. Hyman (1904), 98 Md. 596, 64 L. R. A. 637 (real and substantial relations sufficient); Arbuckle, 51 C. C. A. 122, 113 Fed. 816, 65 L. R. A. 864-873, n.: cases (states have great power).

Limitations on power of states. Bock v. Schwartz, 27 Utah, 387, 65 L. R. A. 308, n.

Municipal corporations under a general charter, authority, cannot declare that a nuisance which was not so at common law. S. v. Indianapolis R. R., 160 Ind. 45, 60 L. R. A. 813, n.; Evansville. This limitation on their power is analogous to that of a court to make rules of procedure. *Rests on Sic utere tuo*, etc. See *id.*; 90 Am. St. 172; Miller, 168 Ind. 230, 120 Am. St. 366-379, ext. n.

Damages for breach of contract. DUE PROCESS OF LAW. Cigar Makers' etc. Union, 72 N. J. L. 214, 70 L. R. A. 156: cases.

Generally: 2 Bouv. 691-694; And. Dic.

POLITICAL QUESTIONS: Luther v. Borden. See CONSTITUTIONAL LAW. S. v. Baughman: 268.

POLLARD v. LYON (1875), 91 U. S. 225, 23 L. ed. 308, Burd. Torts, 199, 2 Kent, 16, Cool., Bish. Torts, New. Def., 3 Suth. Dam. 1204, 1213; Davies, L. R. 7 Q. B. 112, Sedg. Lead. Cas. Dam. 737; Terwilliger v. Wands (1858), 17 N. Y. 54, 72 Am. Dec. 420-436, ext. n. (repeating slander; special damages).

Cited, §§ 63, 296, 313; Gr. & Rud. *Defamation of women.* The following was not actionable: "I looked over a transom and saw Mrs. Pollard in bed with Captain Denty."

All words are not actionable; some are actionable per se, and others only because they injure one in his calling, vocation, business, or profession. In the latter case special damages must be averred, and this was not done in *Pollard* and so the case failed. *Brooker v. Coffin* (1809), 5 Johns. 188, 4 Am. Dec. 337-339, Bigl. Lead. Cas. Torts, 79, 1 Am. Lead. Cas. 87-122, Ames, Torts, 397, 16 R. I. 234, 27 Am. St. 740, 2 Kent, 16, Cool., Bish. Torts, Cool. Const. Lim., 3 Suth. Dam. 1204, New. Def.; Kelley, 16 R. I. 234, 27 Am. St. 739, n. (female accused of fornication actionable).

The word "bitch," when applied to a woman, must be determined by the jury. *Craver*, 114 Ia. 46, 89 Am. St. 346, n. (words, how taken).

Actionable words *per se* must:

1. *Impute a crime.* *Peake v. Oldham* (1775), 1 Cowp. 275, 2 W. Bl. 960, Bigl. L. C. Torts, 75, 2 Gr. Ev. 417, Mews' E. C. L., 2 Kent, 16; New. Def.; Smith, 92 Wis. 133, 35 L. R. A. 620.
2. *A contagious disease:* and either: a, the plague; b, leprosy, or c, syphilis. *Carstake v. Mapledoram* (1788), 2 T. R. (D. & E.) 473, Bigl. L. C. Torts, 84, Mews' E. C. L., Cool., Bish., Add., Moak. Torts; Cool. Const. Lim. 319, 3 Suth. Dam. 1204; J'Anson: 91.
3. *Disreputable involvement in office, trade or occupation.* *Lumby v. Ailday* (1831), 1 Crompt. & Jr. 301, 1 Tyrw. 217, Ames, Torts, 400, Bigl. Lead. Cas. Torts, 87, 2 Add. Torts, 1117, 1161, Mews' E. C. L.; *Ayre v. Craven* (1834), 2 Ad. & El. 12 (20 E. C. L. R.), 4 N. & M. 220, n., 41

Pollard v. Lyon.

R. R. 359 (a most terrible roudé might be a good bookkeeper); *Williams v. Davenport* (1890), 42 Minn. 393, 18 Am. St. 519, n. (defamation of an actor); *Wood v. Boyle* (1898), 177 Pa. 620, 55 Am. St. 747, n.; *Vicars v. Wilcocks* (1806), 8 East, 1, Smith, L. C., Sedg. L. C. Dam. 720, 9 R. R. 361, Mews' E. C. L.; Toogood.

In Pollard special damages were not shown. *Moak, Torts*, 185. Mental pain and anguish are no ground for recovery. *Id.* 186; *Victorian R. R. Commrs; Accessorium*. Unless women can allege and prove pecuniary injury, defamation of them passes as *De minimis*.

✓ *Injury to one in his vocation essential.* *Brown*, 85 Wis. 451, 39 Am. St. 860, n.; cases; *Price*, 134 Pa. 310, 8 L. R. A. 193, n. It is no defamation of a soldier to call him a bankrupt, but it would be to call him a coward, and reversely of a merchant.

False statements depriving one of employment are actionable and a recovery may be had for injured feelings. *Lombard*, 155 Mass. 70, 31 Am. St. 528, n. See *Victorian; Vicars*.

Written defamation is more actionable than oral. *Thorley v. Kerry* (1812), 4 Taunt. 355, 2 Camp. 214, n., 2 *id.* 251, Bigl. Lead. Cas. *Torts*, 90, Ames, *Torts*, 391, 9 Rul. Cas. 1-16, n.; 13 *id.* 626. See *LABEL*; 107 Am. St. 417, n.; *New. Def.*, 2 Kent, 16, 2 Add. *Torts*, 1088; *Dexter v. Spear* (1825), 4 Mason, 115, *New. Def.* 37; *Steel v. Southwick* (1812), 9 Johns. 214, 1 Am. Lead. Cas. 123. Cited §§ 67, 313, Gr. & Rud.

Oral defamation imputing unchastity to a young lady is not actionable, unless she shows it prevented her marrying or injured her financially, specially. 2 Add. *Torts*, 1087. But if the same thing was published in print it is otherwise. 2 Add. *Torts*, 1087.

Telegram is a sufficient publication. *Monson*, 96 Wis. 386, 65 Am. St. 54, n.

Slander of woman, indictable. *Dickson*, 34 Tex. Cr. Rep. 1, 53 Am. St. 694; *Cushing*, 117 Ia. 637, 94 Am. St. 320 (imputing unchastity to any woman is actionable *per se*). *Slander of title.* *Malachy v. Soper* (1836), 3 Bing. N. C. 371 (11 E. C. L. R.), 3 Scott, 723, 6 L. J. C. P. 32, Bigl. L. C. *Torts*, 42, Mews' E. C. L.

Privileged communications; candidates for office. *Harrison v. Bush*; *Toogood*; *J'Anson*; 91; Mews' E. C. L.; *Star Co. v. Donohoe*, sub *Toogood* (S. P. *Harrison v. Bush*).

POLLOCK v. FARMERS' LOAN AND Trust Co. (1895), 157 U. S. 429-624, 158 *id.* 601-715 (injunction to prevent a diversion of trust funds. *Stare decisis* yields to constitutions). See *TAXATION*; *Cujus est instituere*.

POLYGAMY: What constitutes. 9 Am. Cr. R. 412; 3 Gr. Ev. 203-208; And. Dic. 784-788.

POND v. P. (Homicide to defend person and property): See *U. S. v. Holmes*; cases. Right to defend property. *Aldrich v. Wright*.

POOR v. CARLETON: L. C. 37.

POSTER v. POWELL: See *INFANTS*.

POSBY v. DENVER BANK (1895), 7 Colo. Ap. 108. Conclusions of law need not be denied. *Pueblo*; *Dickson*; 34; *Mallinckrodt*; 12a.

POSITO UNO OPPOSITORUM NEGATUR alterum: One of two opposite positions being affirmed, the other is denied.

Posito Uno.

Allegans; *Allegata*; *ALTERNATIVE*; *Ainsley*; *Crater*. §§ 52, 53, Gr. & Rud.

Morals and convenience afford a footing for this maxim. As to morals it is closely related to *Allegans contraria non est audiendus*, also *Falsus in uno, falsus in omnibus*. It also presents phases along with the mystic rule—Every presumption is against the pleader—*Verba fortius accipiuntur contra proferentem*.

To introduce these leading features the following observations are made. The mandatory record for its purposes is the highest evidence known to juridical eyes and reason. Of this record it is taught that thereon depend the conserving principles. *Res judicata facit ex albo nigrum, ex nigro album, ex curvo rectum, ex recto curvum*: A thing adjudged makes white, black; black, white; the crooked, straight; the straight, crooked. The principal maxim is often applied to straighten the crooked and to make certain the ambiguous. It is applied to exclude equivocation, tergiversation and imposition. Where it is not understood and intelligently applied, there pleadings are often made instruments of chicanery and covin.

Pleadings must be certain to support the conserving principles of procedure. For these all lesser matters yield. *In presentia majoris*, etc. This maxim is applied to make documents certain. A court will believe of a cause of action or a ground of defense, as do their respective claimants. Therefore the repugnant pleading is void and will not support a cause of action. *Pain*; 107; *Dolus*.

This maxim is applied in construing denials for an issue in equity, admiralty and under codes. *Dickson*; 34; cases.

The consequence of departures from the maxim is reflected from the state of the law relating to denials. Whether a matter is admitted or denied can not be determined in several states. The condition may be determined from *Seattle Bank v. Jones*, 48 L. R. A. 177, 210, ext. n. Also *Dickson v. Cole*; 34; cases; *Crater v. McCormick* (Colo., affirms); *Paul v. Luttrell* (denies). In some states the maxim is upheld or denied from case to case. *Ubi jus incertum, ibi jus nullum*. Maxims correctly lead. § 3, Gr. & Rud.

Posito Uno.—

From the record an issue must appear with certainty. It should not have to be picked out or guessed at from generalities or overstatement or from palpable juggling with the truth. The pure strict equity and code rules accord with the maxim and are the true ones. The general and the ambiguous pleader should have every presumption made against him, and the record he makes should conclude him. This, the mystic rule, is necessary for morals, economy and convenience. *Dickson v. Cole*: 34 (code cases); *Poor v. Carleton*: 37 (equity cases).

The admission or the denial should likewise appear. Records should not conceal or mislead. They should not bear false witness. They should not present with contradiction, evasion or uncertainty. They should be cleared of absurdity, equivocation and misleading generalities. *Gay v. Winter*. The functions of the record should ever be respected and considered. It ever should be viewed from the conserving principles. §§ 83-123, Gr. & Rud. These involve the allegation, the admission, the denial and the issue. *Munday v. Vail*: 79: cases.

"Thou shalt not bear false witness" is applicable to all judicial instruments and means. If a record can be made direct, certain and specific in one system, then they can be so made in all systems.

The conclusion of law, the common counts and incompatible denials are sources of great disturbances. Wherever they are countenanced and upheld there will be found serious uncertainty and grave perplexities which constantly tend to overflow the law with exceptions and diversities that defy human capacity to master. To obviate such, all must be viewed from the conserving principles and the grounds and rudiments of law. Chief among these is morality. See **THEORY**; **VARIANCE**; *Verba fortius*.

The strict rule against allowing amendments after a case is heard finds justification in the defense of morality. See **AMENDMENTS**; *Falsus*. Every lawyer knows the great temptations to an ambitious client to win a law suit and often his determination to do so at the expense of both fortune and character. In view of these facts the strict rule of equity is well founded.

POSSE COMITATUS: *R. v. Sherlock* (1886), L. R. 1 C. C. R. 20, 10 C. C. 170; *Robinson v. S.* (1893), 93 Ga. 77, 44 Am. St. 127-140, ext. n., 8 L. R. A. 534, 2 Bish. Cr. Proc. 899-939; 2 Bouv. Dic.

Posse Comitatus.—

702. One is bound to join, if called upon. *Contra*: *Firestone*, 71 Mich. 377, 15 Am. St. 266, n.

POSSESSION: As evidence of ownership. See *Williamson v. Brown*. Gives right to defend. Armory. Recent possession of fruits of crime is proof of guilt. *R. v. Partridge*: 190. § 294, Gr. & Rud. *Qui prior est tempore*, etc.; *Friend v. Ward*. Possession as evidence of title to real estate; notice from. §§ 326-333, *Hughes' Proc.* May be declared a crime. *Phelps*: 191.

Generally: 2 Bouv.; And. Dic. Bill to quiet. *McClain C. L.* 544-546; §§ 326-333, *Hughes' Proc.*

Possession is a good title, where no better title appears. 20 Viner, Abr. 278. See **POSSESSION**.

Imparts notice of rights. §§ 124, 307, Gr. & Rud.

POSTPONEMENT: See **CONTINUANCE**.

POST V. KENDALL COUNTY COMMISSIONERS (1876), 105 U. S. 677, Cool. Const. Lim. 136, 168, 6th ed.; 1 Wh. Ev. 637, 880, 1 Gr. 491. *Legislative journals*; *conclusiveness as evidence*. *Union Bank v. Commissioners*. See **LEGISLATIVE JOURNALS**.

POTIOR EST CONDITIO DEFENDENTIS: Better is the condition of the defendant (than that of the plaintiff). Bro. Max.; 15 Pet. 471; *In pari delicto*; *In aequali*; *Holman*: 363; *Whitworth v. Thomas* (recriminatory fraud); *Favorabiliores*; *Melior est*.

POTIOR EST CONDITIO POSSESSORIS: Better is the condition of the possessor. Bro. Max. 215, n., 719. See **POSSESSION**; *In aequali*, etc.; *Armory*: 180.

POULTON V. LONDON R. R.: *Sub M'Manus v. Crickett*. Cited, §§ 151, 275, 306, 307, *Hughes' Proc.*

POWER OF ATTORNEY: 2 Bouv. 714; And. Dic. *Revocation of*. Best, 125 Wis. 518, 110 Am. St. 851-861, ext. n.

PRACTICAL CONSTRUCTION: See *Maher*: 255; *Res ipsa loquitur*; *Contemporanea expositio*, etc.; *Probatu extremis*, etc.; *Suth. Stat.* 207, 309. §§ 180, 287, 290, *Hughes' Proc.*; § 297a, Gr. & Rud.; 8 Cyc. 726-727, 736.

The practice of parties to a contract may give the basis on which its construction rests. Hence, the acts and declarations of parties, constituting their mode of doing business, is strong evidence of the meaning they assigned to contracts made by them. *Att'y Gen. v. Drummond* (1848), Dr. & W. 363, 366, affirmed on appeal, *Drummond v. Att'y*, 2 H. L. Cas. 837, 9 Eng. Reprint, 1213 (tell me what you have done under a deed and I will tell you what that deed means); 2 Whart. Conts. 653; *Res ipsa*; 2 Page, Conts. 1126. A contract may arise from estoppel from conduct. *Moller. In pari materia*; *Lindsay*.

PRACTICE: Constitutions command establishment of rules for, by implication. *S. v. Baughman*: 268; *Windsor*: 1; §§ 7-12, 105, *Hughes' Proc.* See **PROCEDURE**. *Criminal issues*; who tries; important rule. *S. v. Croteau*: 271. *Dominant ideas that control*: Protection; intelligence; morality; former jeopardy; *Res adjudicata*; appellate procedure. *Issues*; how construed and presented. *Blair*: 170. How tendered. *Blair*.

Mandatory record must present issues. *Munday*: 79. *Mode of judicial procedure*. See **ISSUES**; *Blair*: 170. *Presumptions*; bur-

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den of proof affords. See APPELLATE PROCEDURE.
Generally: 2 Bouv. Dic. 714; Mews' E. C. L. 925.

PRÆSENTIA CORPUS TOLLIT ER-
rorem nominis, et veritas nominis tollit errorem demonstrationis: The presence of the body cures the error in the name; the truth of the name cures an error in the description. Bro. Max. 637; 6 Coke, 86.

Names; error in. Wiebold: 98; *Nihil facit error nominis*, etc.; Hurtado: 220; *Res ipsa loquitur*; *Falsa demonstratio*, etc.

Finding contrary to scientific facts. Chybowski, 127 Wis. 332, 7 L. R. A. (N. S.) 357, n.; Weltmer: 268a.

PRÆSUMATUR PRO JUSTITIA SEN-
tentia: The justice of a sentence should be presumed. *Omnia præsumuntur rite*, etc. Best, Ev. Int. ed. 42; *Mascardus de prob. conc.* 1237, n. 2. Every intendment is in favor of a judgment, but not in appellate procedure without its common-law record, nor upon a plea of *Res adjudicata*. *Actore*, etc. *Præsumitur pro legitimatione*: There is a presumption in favor of legitimation. 5 Coke, 98b. *Præsumptio, ex eo quod plerumque fit*: Presumptions arise from what generally happens. 22 Wend. 425, 475. Presumptions arise from regularity, from general conditions, from reason. *Præsumptiones sunt conjecturæ ex signo verisimili ad probandum assumptæ*: Presumptions are conjectures from probable proof, assumed for purpose of evidence. J. Voet. *Ad pand.* 1, 22, tit. 3, n. 14.

PRÆSUMPTIO VIOLENTA, PLENA
probatio: Violent presumption is full proof. See CIRCUMSTANTIAL PROOF.

✓ **PRAYER:** While commanded, it is only for form. White: 140; Walden: 139; Pom. Rem. 70, 82, 517, 528; 1 Pom. Eq. 635, Sto. Pl. 41, 1 Beach, Eq. Pr. 91-93; Finlason, 5 N. D. 587, 57 Am. St. 584. See Merwin, Eq. 524, 525, where confused views of it are found. 16 Encyc. Pl. & Pr. 774-817; Lockhart, 195 U. S. 427 (does not limit statement as to relief). But in case of default, it limits recovery. Russell v. Shurtleff (extreme case).

Belief must be within allegations, prayer—*ad damnum*. Munday: 79; *Judex non reddit plus quam quod petens ipsi requirit*. See *Ad damnum*; 2 Bouv. 716; And. Dic.

PREAMBLES: Express the idea in *Ubi jus*, that remedies shall be afforded. *Demands of*. Chisholm v. Georgia. *Meaning of*. Cohens: 244. *Construction; how regarded in*. Bro. Max. 572; Sto. Const. 457-517.

Generally: 2 Bouv. 717; And. Dic.

PRECEDENTS: The law is governed by principle. Precedents illustrate these. Ashby: 273; Harrigan v. Gilchrist, *sub* MAGNA CHARTA; *Modica circumstantia*; 2 Bouv. Dic. 719-723. Are founded on grounds and rudiments. Smith v. Burrus; Ashby: 273; cases.

PRELIMINARY EXAMINATIONS: R. v. Carden (1879), L. R. 5 Q. B. 1, 14 Cox, C. C. 359, 1 Crim. Law Mag. 196-209, 29 Moak, Eng. Rep. 130; 1 Bish. Crim. Proc. 224-239a; 2 Bouv. Dic. 727-729. See EXAMINATION OF PRISONERS; CRIMINAL COMPLAINT.

✓ **PREMISES:** View of. See *Res ipsa loquitur*; Wigm. Ev.; 2 Bouv. Dic. 729.

PREPONDERANCE OF EVIDENCE: Bonnell: 185; cases. See BURDEN OF PROOF; *Actore*; 17 Cyc. 754-781; § 272,

Preponderance.—

Gr. & Rud. Burdens and presumptions in specific cases; illustrations. 4 Wigm. Ev. 2598, 2500-2539.

One witness insufficient. Harrigan: MAGNA.

PRESCRIPTION: 2 Gr. Ev. 537-546. See LIMITATIONS.

PRESCRIPTIVE CONSTITUTION: See §§ 15, 77, 114-118, 262, Gr. & Rud. Also PROCEDURE; THEORY OF THE CASE; VARIANCE; *Verba fortius*; WAIVER; Foreword, Vol. 2.

Many of the maxims of the prescriptive constitution are mentioned in relation to procedure. See PLEADING; PROCEDURE; CONSTRUCTION; CODES. §§ 83-124, Gr. & Rud. The fundamental rules of procedure are the principles of the unwritten constitution with a changed or varied phrasing and nomenclature; the idea and substance in the same. See CODES; THEORY OF THE CASE; VARIANCE; *Verba fortius*; WAIVER.

Construction applies the principles of. Trist: 214; Oakley: 222; Indianapolis: 223; Thomas v. R. R. See CONSTRUCTION; Galbraith; *Lex non exacte*.

The power of parliament is omnipotent but its acts yield to fundamental law. Stockdale: 277; Dimes: 176; Oakley: 222.

It annexes itself by implication. Evans v. Johnson.

Parliament is omnipotent unless restrained by express defined words in the written constitution. *Henrico Co. v. City of Richmond* (1906), 106 Va. 282, 117 Am. St. 1001; *Brown v. Tharpe*. See CONSTITUTIONAL LAW; CONSTRUCTION; *Lex non exacte*.

The common law was not of less force on account of its not being committed to writing, for, as Fleta observes:

"Leges autem Anglicanas, licet non scriptas, leges appellari non est absurdum, cum hoc ipsum lex sit, quod principi placet, et legis habet vigorem; eas scilicet, quas super dubiis in concilio diffiniendis, procerum quidem consilio, et principis auctoritate accordante vel antecedente constat esse promulgatas; si enim ob solum scripturæ defectum, leges minime conferentur, majoris proculdubio auctoritatis robur ipsis legibus videretur accommodare scriptura, quam decernerent æquitas aut ratio statuents: It is not improper to bestow the appellation of laws upon the English laws, though they be not written, inasmuch as that is law which pleaseth the king, and hath the force of law; that is to say, those which are known to have been promulgated, for the resolving of difficult questions, by the advice of the great men of the kingdom, upon the previous motion, or with the subsequent assent, of the king; for if they were not to be holden for laws by reason of their not being reduced to writing, it would seem that the law derived its weight and authority, rather from the bare writing, than from the impartial discretion of the judge, or the reasons, which moved the lawgiver to the enactment thereof." Fleta.—Crabbe's Hist. of the Law, 3.

The unwritten constitution is interpreted into all compacts. §§ 83-261, Gr. & Rud.; Galbraith; *In jure*; *Lex non exacte*.

Legislative authority is limited by an unwritten constitution. § 139, Gr. & Rud.; Trist: 214; Oakley: 222.

The means of a constitutionalism are imbedded in a prescriptive constitution. § 191, Gr. & Rud.; *In jure*.

The fundamental maxims of procedure, namely, De non apparentibus, Frustra, and Verba fortius, rest as securely as do

Prescriptive Constitution.—

those of self-defense. See ILLINOIS; MISSOURI; NECESSITY. Reviewers, authors, courts and conventions denying this proposition are a menace to the due administration of the laws.

PRESENCE OF PRISONER: Presence of one accused of felony at each step essential. *Sperry v. C.* sub Munday: 79; *Howard v. Ky.* Mandatory record must show this, among other things. *Sperry v. C.* See 2 Bouv. Dic. 732.

PRESENTMENT: 2 Bouv. Dic. 732. Presentment for a crime essential. *R. v. Wheatley*: 19; *Moore v. C.*: 21; *C. v. Eastman*: 22; *S. v. Thurstin*: 23. Of commercial paper. See *id.*

PRESIDENT OF CORPORATION: Scope of his agency. See *Batty v. Carwell*: 54 Am. St. 288, n. See CORPORATION.

PRESIDENT OF U. S.: 2 Bouv. Dic. 734.

PRESIDENTIAL ELECTORS: 2 Bouv. Dic. 734.

PRESUMPTIONS: Presumptions of regularity. See *Omnia præsumuntur*; *Præsumitur*: 1 Chit. Pl. 221, 12 Am. ed.; *Van Fleet*. Coll. Att. 805-847; 1 Ell. Ev. 99-127; §§ 79, 81, 85, 104, 118, *Hughes' Proc.*; *EVERY*: 16 Cyc. 1050-1087. How it affects appellate procedure. *Omnia præsumuntur rite*. *Priestly*, 127 Pa. 420, 4 L. R. A. 503, n.

Is against the statutory record. See BILL OF EXCEPTIONS.

Continuity; *estoppel*. §§ 9-11, *Hughes' Conts.*; *Wigm. Ev.* 2500-2539. Every presumption is against a wrongdoer. *Armory*: 180. Possession of stolen goods is *prima facie* evidence of guilt. *R. v. Partridge*: 190.

Presumption from possession. See POSSESSION; *Williamson v. Brown*: §§ 124, 307, Gr. & Rud.; *Lester*: 341. From the commission of another crime. *P. v. Molineux*. See SYSTEM; *Res inter alios acta*.

Presumptions against res adjudicata defenses; a plea. *L.C.* 81.

Affect pleadings; *proofs*. See EVIDENCE; *Bonnell*: 185; *DIRECTING A VERDICT*; *Probabilia extremis*; *Res ipsa*; *Carwell*: 10.

Of negligence from happening of accident. *Kearney*: 211; cases.

Presumptions; burden of proof affects procedure. See APPELLATE PROCEDURE; *Dovaston*: 217.

Will stand good until disproved. *Stabit præsumptio*; *Bonnell*: 185.

Of survivorship. See *id.*; 51 L. R. A. 863-873; 1 Gr. Ev. 29. See DEATH.

Presumptions essential to avoid prolixity. *C. v. Kane*: 183; *Bonnell*: 185; *Piper*: 114.

Stability and protection depend on. *Crepps*: 113; *Walker*: 118; *Dovaston*: 217; *Bonnell*: 185; *C. v. Kane*: 183; cases. *Omnia præsumuntur rite*.

Are founded on convenience, also necessity. §§ 46, 53, Gr. & Rud. Eight important. See *EVERY*, also *Nemo præsumitur*. All must know the law. §§ 48, 49, 53, Gr. & Rud. Consequences of acts. §§ 48, 49, 53, 67-69, *id.* Of regularity. §§ 53, 104, 123, *id.*

Legislative acts conclusively presumed patriotic and free of fraud. *Fletcher v. Peck*.

Generally: 2 Bouv. 735-737; *And. Dic.*; *McClain, C. L. q. v.*; *Scott v. Shepherd* (*Squib Case*); 1 Ell. Ev. 99-127. *Stabit præsumptio*; *BURDEN OF PROOF*; *EVERY*.

PRISON V. SHELLEY: See JUSTIFICATION.

PRISON V. TORRINGTON: L.C. 213f.

PRIESTLY V. FOWLER: sub Farwell

v. Boston R. R.; *M'Manus*.

PRIMA FACIE: At first view. 2 Bouv. Dic. 739.

PRINCIPES LEGIBUS SOLUTUS EST: The emperor is free from laws. Dig. 1, 3, 31; *Res non potest peccare*.

PRIORITY: *Qui prior est tempore potior est jure*. 2 Bouv. 745; *And. Dic.* 1017. See *Freeman*: 287; *Blair*: 170.

A court may be likened to a town pump; all may draw from it according to his turn. Priority of crown or government—of sovereignty. *Quando ius domini*.

PRIOR TEMPORIS, POTIOR JURIS: He who is first in time is preferred in right. *Co. Litt.* 14a; *Qui prior tempore*, etc.; *Bro. Max.* 354.

PRISON BREAK: Rescue and escape. 2 Bish. Cr. Proc. 940-946, 2 Bouv. Dic. 745.

PRISONER: Rights to a speedy trial. *Begerow* (1901), 133 Cal. 349, 85 Am. St. 178-204, ext. n. (statute limiting time for, is mandatory); 56 L. R. A. 513-545, ext. n. See SPEEDY TRIAL; OPEN COURT; 2 Bouv. Dic. *Rights of*. § 152, Gr. & Rud.

Presence of at each step in trial for felony. *Sperry v. C.* See PRESENCE. *Confrontation of witnesses.* *S. v. Mannion* (1899), 19 Utah 505, 45 L. R. A. 638; ch. 25, Acts of the Apostles.

Testimony at former trial admissible. *Mattox v. U. S.*, 156 U. S. 237; *Tucker*, *Const.* 857.

Right to appear unmanacled at the trial. *S. v. Williams*, 18 Wash. 47, 29 L. R. A. 821-826, n.

Generally: 2 Bouv. Dic. 746-749; **PRELIMINARY EXAMINATIONS**; **EXAMINATION**.

PRIVACY: One's right to. *Robeson*, 171 N. Y. 538, 89 Am. St. 828-858, ext. n., 59 L. R. A. 478 (protection of); *Re Molineux* (1904), 177 N. Y. 395, 65 L. R. A. 104; *Paversich*, 122 Ga. 190, 106 Am. St. 104-133, n. *Cites Semayne's Case*; *Prince Albert v. Strange*; *R. v. Dean of St. Asaph*. *Injunction to protect*. *Itzkovitch*, 115 La. 479, 1 L. R. A. (N. S.) 1147, n., 112 Am. St. 272.

PRIVATE LAND CLAIMS: 2 Bouv. Dic. 751-753.

PRIVATES FACTIONIBUS NON DUBIUM EST NON LADI JUS CÆTERORUM: There is no doubt that the rights of others cannot be prejudiced by private agreements. Dig. 2, 15, 3, pr.; *Bro. Max.* 697; *Res inter alios*, etc.; *Pacta*, etc.; *Conventa*, etc. *Cited*, § 18, also § 3, *Hughes' Conts.* *Privatorum conventio juri publico non derogat*: Private agreements cannot derogate from public law. Dig. 50, 17, 45, 1. *Salus populi*, etc.; *Pacta*, etc.; *In pari*, etc.; *Bro. Max.* 695. *Cited*, § 18, also § 3, *Hughes' Conts.* *Privatum commodum publico cedit*: Private yields to public good. *Jenk. Cent.* 273; *Salus populi*, etc. *Privatum incommodum publico dono pensatur*: Private inconvenience is made up for by public good; *Salus populi*, etc.; *Bro. Max.* 7. § 53; **CONVENIENCE**, Gr. & Rud.

PRIVES: When bound by litigation. See *Res adjudicata*; *Outram*: 25; *Bauerman*: 48; 2 Bouv. Dic. 754.

PRIVILEGE: 2 Bouv. Dic. 754. Privileges and immunities. *Id.* 758. Necessity; when a privilege. See *Neccastias inducit privilegium*, etc.

PRIVILEGE OF WITNESSES: From self-incrimination; *Nemo tenetur*, etc.; *Fries v. Brugler*.

From arrest. *Dunlap v. Cody*: 168.

From arrest, while attending court. This applies to parties, attorneys and witnesses. *Dunlap*: 168; *Fries v. Brugler*. And

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from service of process of any kind. Dunlap: 168.

PRIVILEGED COMMUNICATIONS:

Greenough v. Gaskell; 1 Gr. Ev. 236-254a; 1 Wh. Ev. 576-608; 4 Wigm. Ev. 2385-2396; 2 Bouv. 755-757; And. Dic. p. 213. *Salus populi suprema lex.*

Of attorneys. Weeks, Attys. 141-182; O'Brien v. Spalding (1897), 102 Ga. 490, 66 Am. St. 202-243, ext. n.; Greenough v. Gaskell; Herman v. Schlessinger (1902), 114 Wis. 322, 90 N. W. 460, 91 Am. St. 922 (attorney and client); 4 Wigm. Ev. 2290-2329.

Confidential communications. 66 Am. St. 202-243; Bouv. Dic. 389; 4 Wigm. Ev. 2336-2337.

Husband and wife. 4 Wigm. Ev. 2332-2341; S. v. West.

Jurors. 4 Wigm. Ev. 2345-2364.

State secrets and official documents. 4 Wigm. Ev. 2367-2376.

Physician and patient. 4 Wigm. Ev. 2380-2386.

Judges incompetent to impeach records they have made and passed upon. Fayerweather v. Ritch, *sub Res adjudicata*, q. v.

PRIVITY: See Scott v. Shepherd (Squib Case); Woodward v. Miller. §§ 67, 304, Gr. & Rud. In *jure*, etc. In contracts. Hendrick: 319. Essential. Ans. Conts. 209. Remoteness. In *jure non remota*, etc. §§ 309a, 342, 347, Hughes' Proc.

PRIZE FIGHT: 2 Bouv. Dic. 761, 762.

PROBABLE CAUSE: 2 Bouv. Dic. 762.

PROBANDI NECESSITAS INCUMBIT illi qui agit: The necessity of proving lies with him who sues. Inst. 2, 20, 4. See BURDEN OF PROOF; *Actore*, etc. *Semper*.

PROBATA: Will not supply *allegata*. § 272, Gr. & Rud.

PROBATE PROCEEDINGS: Nature of. Bloom. See ADMINISTRATION; Brown, Jurisdic.

PROBATE EXTREMIS PRÆSUMUNTUR media: The extremes being proved, the intermediate proceedings are presumed. 1 Gr. Ev. 20; Montgomery v. S. (the exclusion of negroes from juries shows a system of rejecting them). See *Res ipsa loquitur*; *Es uno disces omnes*. Gillett, Indirect Ev. 91-97; Cool. Torts, 457; Bray v. Adams.

Cited, §§ 186a, 188, 51, 53, 67, 125, 271, 287, Gr. & Rud.

From the Mandatory Record opinions are construed. Cohens: 244. Inferior courts are construed within and from the Mandatory Record. *Omnia præsumuntur rite*.

Circumstantial evidence depends upon presumptions.

PROCEDURE: Its leading maxims. §§ 118, 144, Gr. & Rud. *Great cases*. §§ 119, 143, *id.*

A basic subject. §§ 17, 39, 49, 106, 147, 170-188, 159, 267, 268, Gr. & Rud.

Defined. § 48, *id.* See CONSTITUTIONALISM; GOVERNMENT.

Backbone and vertebrae. §§ 45, 111, Gr. & Rud.

Is an implication. §§ 111, 147, 148, *id.*; §§ 7-12, Hughes' Proc.

Study of, is a study of government. Blake; U. S. v. Cruikshank: 232; Marbury: 142. §§ 24, 77, 84, 88, 90, 96, 108-112, 118, 133, 136-140, 144-148, 163, 198, 200, 207, 237-256, 246, 261, 267, 268, 292, Gr. & Rud.

Government prescribes. §§ 62, 88-89, 148, 152, *id.* *Constitutions provide for.* §§ 152,

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154, 207, *id.* *Maxims found.* §§ 39, 118, *id.*

Title to property involves. §§ 124a, 238, *id.*

Estoppel unfolds. §§ 187, 188, *id.*

It rests upon the prescriptive constitution. §§ 83-123, *id.*

Procedure in its largest sense is that body of principles and rules that regulates the administration of a constitutionalism. Its requirements may be expressly declared or they may be imported by construction, agreeably to the maxim that a principal thing carries with it its incidents. Much that relates to procedure is a constitutional implication, which often appears as an unwritten constitution. This proposition depends on the authorities next cited. They, together with their cognate maxims and cases, should be well understood.

Procedure characterizes a government as accusatory or inquisitorial, or as absolute or despotic. The latter proceeds without allegations or proofs. The inquisitorial extorts confessions and self-incriminatory evidence. Hale v. Henkel. The former is the established theory of England and of most of the states; all states respect it in some cases, but not in all. Wherever pleadings are waived, where evidence alone stands for allegations, where the statutory record is substituted for the mandatory record and its requirements, there are great departures from the Roman maxims adopted by England and many of the states, also in many federal cases. U. S. v. Cruikshank: 232; cases; *De non apparentibus*.

Procedure articulates government. Its requirements are disclosed in discussions relating to the proposition that the study of procedure is a study of government. This appears from a consideration of the only thing that separates a constitutionalism from an absolutism, which is, namely, the mandatory record. This record is the interaction of requirements of a government of defined and limited powers. The latter kind have divisions of state power, requirements for due process of law and other conserving principles. Strange as it may seem, these principles depend upon nothing greater or more impressive than an essential record, which is made, preserved and constituted the arbiter (§52, Gr. & Rud.) of hundreds of

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contentions, or questions as to what is right and what is wrong, or in other words, uniform and equal law on the one hand and the ways of arbitrariness on the other. The latter is at war with fixed, invariable rules, with records, with specific statements, with a detail of descriptive facts, with ceremonies relating to service of process, the giving of notice and the making and conserving of a record that is dictated by a government of laws and not of men. Arbitrariness is ever at war with fixed principles of regularity, certainty, continuity and equality. Arbitrariness has the least respect for the rules requiring the best evidence or its chief rule, the record rule, namely, what ought to be of record must be proved by record and by the right record; a part of this rule is, what is not juridically presented cannot be judicially considered. A part of this rule is expressed thus: A court is bound by its record.

Starting from the above ideas and rules the law of procedure is developed. From those conceptions procedure must be introduced and comprehended, else there results a barren and discouraging result. See observations under Equity.

The study of procedure is a study of government for the reason that procedure is that body of rules of evidence, pleading and practice relating to the establishment, vindication and maintenance of that record which distinguishes a constitutionalism from an absolutism. That record, being the only barrier between arbitrariness and the constitutional exercise of authority, is a *constitutional implication* where it is not expressly provided for in organic law, which it cannot well be, for the reason that codes and details cannot be incorporated in constitutions. Nevertheless they must exist, otherwise that record, so important, as already observed, would be inoperative. That it may be useful, of force and effect there result the rules of procedure providing for regulating and administering it.

The essential record is a mandatory requirement of a constitutionalism which is wholly dependent on that record for its distinguishment from an absolutism, wherein a tax may be laid, collected and disposed

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of without any evidence, trace or means of accounting left behind. Consequently it appears that an absolutism is inimical to a record as it must be comprehended and have operation in a constitutionalism. Looking from government to that record and its necessary rules, the conclusion is offered that the study of procedure is a study of government.¹

"What ought to be of record must be proved by record and by the right record" is deduced from the foregoing propositions; therefore this rule is of great import and dignity. For distinction and to impress its importance, it may be designated the constitutional rule. For brevity it may be called the record rule. No greater rule of evidence can be mentioned; it is a rule of the best evidence. It is a rule of protection. It is a barrier against arbitrariness and despotism. It is a bulwark protecting all our rights and liberties. It is a most comprehensive rule and therefore it is susceptible of varied and diverse expression, besides it has many corollaries. Among these are: What is not *judicially* presented cannot be *judicially* considered. A part of this rule is, a court is bound by its record.

A fact not juridically made to appear is presumed not to exist.² To be considered with these rules is a universal rule of pleading and construction. Being a presumption, of course it is a rule of evidence. This very important rule is as follows:

Every presumption is against the pleader (or composer): *Verba fortius accipiuntur contra proferentem.*³

But for the operation of the last rule, if one were indicted he would be practically convicted. The presumption of innocence often appears as a corollary of the cardinal rule above mentioned.⁴

There are no presumptions in favor of a pleader before he *affirmatively* alleges and proves. This rule is of unvarying strictness. It is the same yesterday, today, tomorrow and

1—U. S. v. Cruikshank; *De non*.

2—*De non*; *Expressio unius*.

3—Dovaston: 217; U. S. v. Cruikshank: 232; Rushton: 5.

4—*Actore non probante*; *Semper præsuntur*; Coffin v. U. S.

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forever. It is the same on general demurrer, on motion in arrest of judgment, on collateral attack and *Res adjudicata*. It is not a rule of gradation or fluctuation. It is of uniform application. The establishment of a contrary view disturbs jurisprudence throughout.

A reversal or disregard of the maxim last mentioned profoundly affects procedure; it disturbs many of its conserving principles and introduces hopeless incongruities. It might be well to remember this as the mystic rule.

By an application of the last maxim a proceeding is often tested for validity; thereon they are often declared *coram non judice*. A proceeding *coram non judice* in one relation is in all. It cannot be *coram judice* upon collateral attack, but *coram non judice* in *res adjudicata*.⁵ It is due to confess, however, that many cases can be cited to the contrary. And it is well to observe that there are many courts which look wholly to legislative expression to see what principle governs; they seem to think that legislatures can frame a code that can completely regulate procedure.

A court is bound by its record and to construe its authority according to the constitutional or record rule, also the mystic rule, the last rule mentioned may be called the judicial or *coram judice* rule. From these rules as a center radiate innumerable lesser and secondary rules. They should be clearly perceived and thoroughly comprehended.

All officials in a constitutionalism must have, act upon and proceed upon the authority of a record, *e. g.*, legislatures must have and keep a record.⁶ The title of an enactment limits and controls the act.⁷ Executive officers must have not only process but regular process.⁸

Inferior and statutory tribunals must make and keep a record. By it they are strictly judged.⁹

Superior judges also have a record; figuratively speaking, it is their power of attorney. This record is

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strictly judged as already observed. Protection demands strict construction. This is well illustrated by the doctrines of *res adjudicata*, also collateral attack. Consequently the senseless or repugnant pleading is void;¹⁰ likewise one lacking a material allegation.¹¹

A court looks at its pleading, judging it by the constitutional or record rule, making all intendments against the pleader according to the mystic rule, and then gets its bearings, its course and distance from the great fixed star, the due administration of the laws, or in other words, the supreme law of the land, also the particular law applicable to the record, the authority, and then proceeds accordingly.

The record presented for the application of judicatory power binds the court. It is bound by the allegations, the admissions, the denials and the issues presented by the record. If this record shows lack of jurisdiction, either of subject-matter or of the person, the court has no authority to attempt to "consider, order and adjudge." To attempt to do so is usurpation. The judgment of the court is ever after measured and restrained by the record empowering the court to act, *e. g.*, if property is seized and sold upon execution issuing from that judgment, and it is sought to prove title under that judgment, that judgment and its record foundation must be offered in evidence; an exemplification of the pleadings, indeed of all the essential record, must be produced. An authority must be pleaded and proved.¹² Estoppel of record must be proved by the whole record,¹³ as is title to property, just mentioned; the rules of pleading and proof are the same. Estoppels are odious, therefore all facts necessary to sustain must *affirmatively* appear; nothing is taken by argument or inference; every presumption is against the pleader.¹⁴ The mystic rule always applies without gradation, change or variation. It is an even, equitable, and uniform rule; it ad-

5—*Ubi eadem ratio, ibi idem jus*.

6—Suth. Stat. 27-52.

7—*Bobel v. P.; Nigrum nunquam excedere debet rubrum*.

8—Savacool: 164; Blair: 170.

9—Creppe: 113; Piper: 114; §§ 13, 27, Hughes' Proc.

10—Pain: 107.

11—*U. S. v. Cruikshank*: 232; *Moore v. C.*: 21; *Rushton*: 5; *R. v. Wheatley*: 19; *McAllister*: 3; *Van Leuven*: 14.

12—Clem: 2c.

13—Wright: 28.

14—Outram: 25; Cromwell: 26.

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mits of neither augmentation or diminution. It is not affected by the theory of the case. Its disuniform application would lead to absurd results.¹⁵

Consent cannot enlarge the *coram judice* rule, for upon it depend the conserving policies or principles of procedure, which affect the whole public. Therefore, the parties named upon the record cannot consent or contract to affect or bind the whole public.¹⁶

A court looks at and considers the conserving principles of procedure before it looks at what particularly affects the parties named upon the record; those policies first, after them the rights of the parties to the record.¹⁷ A court is bound by its record and the law applicable thereto. Without this the court can do no authorized or defensible act.¹⁸

The *coram judice* rule is closely related to the constitutional or record rule. All tests of its proceedings are intermixed with that rule, i. e., what ought to be of record must be proved by record and by the right record.¹⁹

These three rules, namely, the constitutional, the mystic and the *coram judice*, have many phases. See Codes. In one place each may have an evidentiary appearance, in another that of pleading, and elsewhere as a rule of practice.

These three leading rules may be called, by way of distinction, the "pointers" and the North Star of procedure; they are datum posts from which all is reckoned; they are universals; they fill a like place in all systems of procedure that are consistent and uniform. All courts regardful of the essentials of the due administration of the laws, of the supreme law of the land, of its essential means, respect, vindicate and maintain these universal rules, which are the constitutional, the mystic and the *coram judice* rules.

With them should be connectedly considered the theory of the case, aided by pleading over and by verdict, *allegata et probata* must correspond, variance,²⁰ waiver, the lim-

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its of the presumption of regularity, and of liberal construction,²¹ also the conserving principles of procedure.²²

The constitutional record is required and safeguarded for protection, morals and certainty. Wherever it is required it is the exclusive evidence.²³ It cannot be waived, consented or contracted away for reason of public policy.²⁴ The mandatory requirements of a constitutionalism cannot be waived. A contract for the ways of arbitrary government would be illegal and void.²⁵ What cannot be done directly cannot be done indirectly;²⁶ therefore acquiescence in proceedings in disregard of the constitutional record and rule is unavailing to predicate waiver upon.²⁷ Such proceedings are *coram non judice* (not before a judicial tribunal) and are *ipso facto* void. They may be objected to for the first time on collateral attack by any one; there is no estoppel in their behalf. One inciting, instigating and inviting an unlawful proceeding cannot invoke estoppel as a bar to any one objecting to his reaping the fruits of his illegality.²⁸ Parties insisting upon a course forbidden by law for the public welfare can take no benefits therefrom. One attempting to enforce a *coram non judice* proceeding to take some benefit or shelter therefrom is often worse off than one seeking to enforce an illegal contract, as a deed or a simple contract.²⁹

Error shown from the constitutional or mandatory record needs neither objection, exception, motion for new trial nor assignment of error to make it availing in an appellate court; nor in any court where it is objected to as *coram non judice*, whether from *res adjudicata* or collateral attack or in defense of any other conserving principle of procedure. Upon the vindication of these depends the due administration of the laws or the supreme law of the land. These are defended by

21—Harrow v. Grogan.

22—Fp. 7-14, Hughes' Proc.; §§ 83-123, Gr. & Rud.

23—*Expressio unius.*

24—*Salus populi; Res inter alios; Planning: 2d.*

25—*In pari delicto; Pacta privatorum.*

26—*Quando aliquid prohibetur, etc.*

27—Windsor: 1; Cooper v. Reynolds.

28—*Qui primum peccat ille facit ritam.*

29—*In pari delicto, etc.; Trist: 214.*

15—*Uno absurdo.*

16—*Res inter alios; Id quod nostrum.*

17—Austin R. R. v. Cluck; Planing: 2d.

18—*Ex facto oritur jus.*

19—Planing: 2d.

20—*Frustra probatur.*

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constitutional courts *sua sponte*.³⁰ For this the supreme law of the land obligates all judges, both federal and state.³¹

In præsentia majoris cessat potentia minoris: In the presence of the major the power of the minor ceases. The constitutional record and rule are not affected by lesser records or less worthy evidence. As its wording indicates, it is exclusive. It is a dominating record in so far as it is essential for a government of limited and defined powers. Possibly there may be in some cases matter of abatement or dilatory character in it relating to which error may be condoned or waived. But generally the matter stated in the mandatory record is irrefragable; it cannot be disputed or overcome by what is shown by the statutory record or by evidence *aliunde*.³²

The great, the grand, the constitutional or mandatory record and the matters for which it is conceived and exists constitute the ground of its dominancy, and the reason why *In præsentia majoris*, etc., should be viewed as a fundamental conception of law. That record and this maxim applicable thereto should be constantly borne in mind.

Oral evidence is a correlative of the record rule and brings into view its multitude of discussions.³³ Oral evidence has the least to do with the record rule. However, it may be well to note two exceptions to the general rule, namely, the real party in interest directing and controlling litigation may be shown, whether named on the record or not, and the subject-matter of the litigation may be identified by oral evidence if consistent with the record.

The mandatory requirements of a constitutionalism constitute very high law. They arise from necessity,³⁴ and it is a ground and rudiment in all systems, although it is often taught and comprehended thus: "Necessity knows no law." It is the second maxim discussed by Broom in his Maxims, *Salus populi*

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suprema lex being the first. These maxims are among the greatest factors of the law, as many decisions clearly show.³⁵ *Necessitas inducit privilegium*, etc., is also one of Bacon's maxims. And it may be observed, as it is apropos to morality as a juridical element already mentioned, that it is the third basic element discussed in Broom.³⁶ These juridical elements should be familiar to all. They are elements of intellectual culture; they are as much of theology as they are of law; indeed, they are both at one and the same time. For instance, if a fact is admitted upon the mandatory record, evidence to contradict the same is inadmissible. *In præsentia majoris*, etc. The court has no authority to receive evidence to contradict such admission. Receiving it is void *ab initio*, for the reason it involves usurpation or abuse of power.³⁷

It is vain and useless to prove what is not alleged: *Frustra probatur quod probatum non relevat*. What is not juridically presented cannot be judicially considered, is a basic rule already mentioned. An allegation not denied is admitted under all systems.³⁸ The codes reaffirm this rule. Such admission on the mandatory record is conclusive and is not affected by matter appearing from the statutory record, or evidence *aliunde*, or by oral evidence. *In præsentia majoris*, etc. Beyond these two exceptions the record must speak for itself. It cannot be helped out in patches or conclusions of it. Nothing satisfies the record rule except either the record or an exemplification thereof.

Oral evidence as a juridical element must be considered along with the record rule, also as broadly as this: That all matters and contracts may appear from oral evidence except requirements of a constitutionalism or a judgment and its authority, or foundation, the deed, commercial paper, what is required by the statute of frauds, and generally stipulations of counsel.

From these views the importance of oral evidence in procedure will

30—Campbell: 2; Garland: 60.

31—SUPREME LAW OF THE LAND: Art. VI, Const. U. S.

32—Mondel: 77; Planing: 2d; Bradbury: 36. *Frustra probatur*.

33—See ORAL EVIDENCE; Pym: 52; Woolham: 58.

34—*Necessitas inducit privilegium quoad jura privata*.

35—Langabier: 174a (process may issue and be served on Sunday).

36—*Summa ratio*; Trist: 214.

37—*Quod ab initio*; Shutte: 291.

38—*Qui non negat fatetur*; Dickson: 34; cases.

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appear. It is well presented from the law of contracts, which are classified thus: judgments, deeds and simple contracts. This classification depends on procedural rules.³⁹

Public policy is closely related to the three leading rules, namely, the record, the mystic and the coram iudice rules. All of the conserving policies of procedure have their roots in public policy—Salus populi suprema lex. Public policy is the mother of government, and consequently of those mandatory matters that cannot be waived or contracted away.⁴⁰ Public policy and its incidents, the above matters, are first sought, considered and vindicated before the rights of the parties named on the record are considered.⁴¹ Courts are created to administer justice, but still according to the forms of the law, for these are a part of the law.⁴²

Public policy, respect for *Ignorantia legis neminem excusat*, the law of necessity,⁴³ the conserving principles of procedure, of *stare decisis* make the hard case for the parties named upon the record. Enforcement of the mandatory requirements of a constitutionalism must necessarily make the hard case above referred to.⁴⁴ Therefore hard cases must necessarily arise.

The technical safeguards of the three great rules, and of such principles as the division of state power, the first great basic requirement of a constitutionalism,⁴⁵ depends upon technical requirements. Therefore:

Technicalities are the safeguards of the law. Enforcing these results in apparently hard cases, but after all in the wise administration of the laws these are not hard cases. They are the result of enforcing Ignorantia legis neminem excusat, which is a leading rule of public policy, which also includes the law of necessity, morals, convenience, reason and waiver. These will be introduced in following sections.

39—Preface, Hughes' Procedure.

40—*Res inter alios; Pacta privatorum*; § 18, Hughes' Conts.

41—Austin R. R.; Planing: 2d; Rush-ton: 5.

42—Planing: 2d; *Ordine placitandi servato, servatur et ius.*

43—*Necessitas inducit privilegium*, etc.

44—Planing Mill Co.: 2d.

45—Dennett: 145; Flournoy: 146; *Expressio unius.*

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Necessity is a very high law, is a part of public policy and pervades procedure throughout. It is one of Bacon's twenty-five maxims. It is Broom's second,⁴⁶ Salus populi suprema lex being the first. The mandatory requirements of a constitutionalism rest upon the law of necessity; the law of self-defense also. It is necessarily the same in all systems.⁴⁷ It is the ground of the leading rule of construction wherein the principal thing carries with it its incidents.⁴⁸ Relating to this the two schools of construction are introduced. The liberal or logical school construes from logic, reason and necessity and accords to every principal power or matter granted whatever is necessary for its existence and operation. Marshall in M'Culloch: 147 expressed it thus:

"Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

The conserving principles of procedure are indispensable for the due administration of the laws, in other words, the supreme law of the land. Almost every one of these often require a construction as broad and as deep as the above quotation. The supreme law of the land expressly includes treaties made by the authority of the United States; these involve ambassadors, consuls, treaties, leagues, truces and compacts with the powers of Europe. Now, all of these powers adopt the Grotius code or his rights of war and peace. This is written from the civil law of Rome, and he intended it should be construed thereby. It is necessary to construe a compact by the intention of the parties thereto.⁴⁹ Accordingly we have one part of the "supreme law of the land"⁵⁰ construed by the civil law. Here it may be asked if one part of the supreme law is construed by one system of laws, and the other parts, namely, "this constitution and laws made in pursuance thereof," are construed by another system or systems. Speaking from federal decisions, to insist

46—*Necessitas inducit privilegium quoad jura privata.*

47—U. S. v. Holmes.

48—*Expressio eorum*; M'Culloch: 147.

49—*Verba intentione debent inservire.*

50—Art. VI, Const. U. S.

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that would be a lame and impotent conclusion. It would be absurd.⁵¹

The civil law of Rome gives to the continental powers of Europe the civil law; Germany expressly adopts it in the oath to judicial officers who are sworn to uphold the laws of Europe, and where they are deficient, then according to the civil law; in other words, where the law is deficient the maxim rules.⁵²

The powers of Europe adopt the maxim, the condensed good sense of nations, as a part of their jurisprudence. Multitudes of decisions show that many American jurisdictions have done the same thing. Concession of this fact goes far to show the existence of an unwritten constitution. For the liberal constructionist there is the least debatable ground for the unwritten constitution.⁵³ It is the strict constructionist who stands upon the express letter and insists on the application of *Ita lex scripta est*.

In Illinois the cases show that the unavailing contention was made that a justice of the peace could not dispense with exclusive statutory ceremony, that a summons must issue, be served and be returned, by *full appearance* and submission to the court's jurisdiction; otherwise, where it is held that a party could not appear and give jurisdiction to an inferior court by agent or attorney, also that the agent could not verify a pleading for the party sick or absent because the *statute did not so provide*. Accordingly it appears that the due administration of the laws and its conserving principles and their essential elements are at the mercy of legislatures. To such conclusion all must come who insist that every statute is valid according to its strict, literal wording, unless the particular clause of the constitution violated is pointed out, expressed and defined. *Ita lex scripta est*.

From necessity liberal rules of construction exist. What are their limitations depends on reason and

51—*Uno absurdo dato*; End. Stat. 182.

52—*Regula pro lege si deficit lex; Maxima ita dicta*, etc.

53—M'Culloch: 147 (Marshall); The Federalist, 34 (Hamilton); Dash: 237a (Kent); Oakley: 222 (N. Y.); Trist: 214; Indianapolis: 223 (Field); Bates: 225; P. v. Turner: 252 (Ill.); P. v. Town of Salem (Cooley); Kollock (Marshall, Wis.).

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the nature of the subject-matter, as declared by Marshall.⁵⁴ Practically from necessity, for the operations of a constitutionalism an unwritten constitution attends and annexes tremendous incidents or implications. For these may also be cited Coke, Hobart, Mansfield and Story.⁵⁵

From necessity construction must be from the nature of the subject-matter, *e. g.*, the code provides:

"The statement shall contain the facts necessary for a cause of action in ordinary and concise language and without unnecessary repetition."

This provision refers to mandatory matter, also formal. The first cannot be waived, the latter can be; the former is a mandatory declaration, the latter is directory; both matters are affirmative statutes. The words "are matter of constitutions" are reaffirmed in the requirement for the *cause of action*. A constitutional court can only act upon that. But as to the other requirements very different rules are applied, and all these from necessity of carrying forward the due administration of the laws. For these, right rules of construction are a necessity.

From necessity there must be intelligent and right construction; any other will introduce the vain and fruitless, the absurd and the unreasonable. Reason, as will soon be noted, is another fundamental requirement. These requirements interweave and interlace. The law is an entirety. Preceding sections show that the three leading rules are a necessity. They should be comprehended as such.

Morality lies at the base of the three leading rules, namely, the record, the mystic and *coram judice* rules. Indeed, it often appears as an important and independent center from which emanates many rules and influences upon procedure. Its intervention often reflects it as an important and quite independent juridical element. As a general ground and rudiment of law it is of much significance.

All rules excluding oral evidence are aimed at morals in a general sense, as will appear from the history of the statute of frauds. Rules excluding oral evidence are rules of

54—M'Culloch: 147; Cohens: 244; Martin: 246 (Story).

55—*Lex non exacte definit, sed arbitrio boni viri permittit*.

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certainly, convenience and preventive of fraud.

Morality is involved in the maxim *Summa ratio est quæ pro religione facit*: Where the laws of God and of man come in conflict the former will be preferred. This is Broom's third maxim and follows that of public policy and necessity already introduced. It is a part of English and of Roman law. It is synonymous with Christianity, as discussed in many English cases.

Morality pervades the leading subjects of the law, and especially equity, also contract, crime, tort and construction. Its principles are broad and deep. It is very instructive to observe its influence in all the leading subjects. The maxims of the civil law are burdened with it.⁵⁶ The maxim barring inconsistency and falsehood well illustrates it, *e. g.*, under the civil law if one demanded a respondent's answer under oath he thus sought a discovery and evidence which he could introduce and use in his own behalf; therefore, he held the respondent out as credible and worthy of belief. Consequently his sworn answer had the force and effect of one credible witness, and as the burden of proof devolved upon the complainant,⁵⁷ he must overcome such verified answer by at least two witnesses or by one witness together with corroborative circumstances. This rule is now operative in federal procedure.⁵⁸ One is not allowed to blow hot and cold; to appraise and reprobate at the same time.⁵⁹ This idea is the basis of the estopels which ramify all legal subjects. One who contradicts himself is discredited.⁶⁰ One whose pleading is repugnant has no juridical standing.⁶¹ One whose denials are inconsistent has every presumption made against him;⁶² here the mystic rule

56—*In pari delicto potior est conditio defendentis; In æquali jure melior est conditio possidentis; Allegans contraria non est audiendus; Nullus commodum capere potest de injuria sua propria; Malum non præsumitur; Qui sentit commodum, sentire debet et onus.*

57—*Actore non probante reus absolvitur; Semper præsumitur pro negante*; Bonnell: 185.

58—*Vigil v. Hop*, sub Bonnell: 185.

59—*Allegans contraria non est audiendus.*

60—*Falsus in uno*; see IMPEACHMENT OF WITNESSES.

61—*Pain*: 107.

62—Dickson: 34: cases.

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is clearly involved, as it always is where the question is, what is juridically presented by the right record? It is well to observe that many cases can be found opposing these views.

False and sham pleadings present moot and mythical matters for courts to consider, which they were not created for; they were created to entertain real and *bona fide* causes only. Jurisdiction can attach to no other.⁶³ Consequently the mandatory requirements and basic principles of constitutional law are involved. A cause of action or controversy must be real, not fictitious, in order to attract jurisdiction. It is a contempt of court to employ false, sham and misleading pleadings, which are that juridical means of investing a court with jurisdiction of a subject-matter in order to adjudicate it. Pleadings are to limit issues and to narrow proofs.⁶⁴ For this purpose allegations must be *bona fide* and denials must be specific, positive, certain, unequivocal and conscientious.⁶⁵ The requirements of the equity denial are adopted by the code.

General allegations and denials, equivocal admissions and issues are obnoxious in equity and under codes. They also involve the rule, a court is bound by its record; that it may be allegations and denials must be certain and specific; consequently conclusions of law⁶⁶ and general denials are offensive to the certainty required in equity and under codes. False and sham pleadings are a culpable abuse of justice.⁶⁷ They are offensive to morality and the due administration of the laws. They should be considered from the three leading rules. Sham and false pleadings are poor servitors of the conserving principles of procedure. They are plainly opposed to the three leading rules.

Verba fortius accipiuntur contra proferentem (every presumption is against a pleader), *Falsus in uno, falsus in omnibus* (false in one thing, false in all), *Allegans contraria non est audiendus* (he is not

63—Graver: 103; Montana: 10b; *Fabula non judicium*; REMOVAL OF CAUSES.

64—Bliss, Pl. 138; Kollock; Dickson: 34: cases.

65—Dickson: 34: cases; Humphreys: 38.

66—*U. S. v. Cruikshank*: 232; Moore v. C.: 21.

67—See SHAM PLEADINGS.

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to be heard who alleges contradictory things), and *Nullus commodum capere potest de injuria sua propria* (no man can take advantage of his own wrong) are useful maxims of the law that often reflect aspects of morality. The same has already been observed of equity and its maxims.

Reason is a leading ground and rudiment of the law. The unreasonable, the vain and fruitless, the useless, the absurd and impossible thing has no place in jurisprudence. The proposition is supported by many maxims.⁶⁸ These and their cognates suggest much that will instruct.

Reason is reflected from the three leading rules. As already explained, they are interactions of the requirements of a constitutionalism, or of the conserving principles of procedure. To support the numberless rules of procedure they must be traced and comprehended from government, its incidents and operations.

All juridical elements and rules must have a footing and this footing is reason. For a reason lesser laws yield to greater;⁶⁹ one is presumed to know the law;⁷⁰ of public policy;⁷¹ of necessity;⁷² of morals.⁷³ Other grounds and elements of law or juridical elements remain for introduction and discussion. Each of these should be considered in connection with the foregoing rules, and especially with the above observations relating to reason.

The establishment and enforcement of unjust, immoral and unreasonable laws has for its effect the undermining and the overwhelm of authority or government as all history shows. All government has opposition which must be kept in close confines and therefore a minority. Nothing placates opposition to government more than a wise and just administration of salutary, reasonable, moral and just laws. The history of the decline and fall of Rome stands to support the above

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conclusion; likewise the Declaration of American Independence. Wherever there is a disregard by government of its guarantees in bills of rights and constitutions it is adding weighty matters to the grounds of discontent. Government owes the citizen protection without sale, denial or delay, under wise, just, moral and reasonable laws, and for these ends all laws must be construed and harmonized.⁷⁴ Consequences of departures from reason are found in the history of the reigns of terror in France. Philosophers have justified those as the natural, direct and probable effect of antecedent causes; they have explained how one unreasonable law causes its reactions and overwhelm of governments. Progressive, advancing humanity strives for enlightened and just laws. To what extent respect for the foregoing rules tends to establish equal, uniform, stable and reasonable laws each reader must judge for himself. Law givers can measure and test their jurisprudence by the "met-wand" of the three leading rules already introduced. These have a protean language or expression, and one of these expressions is, that reason is the soul of the law.

*Convenience is favored by the law.*⁷⁵

It is a ground and rudiment of law closely allied to public policy and reason. It has developed commercial paper and much of contract law in general. From the conserving principles of procedure many of its rules have been established from convenience, especially the law of presumptions. In this connection may be mentioned the following presumptions, namely, every act is presumed rightly, regularly and validly done;⁷⁶ every one is presumed innocent until he is affirmatively proven guilty;⁷⁷ every presumption is in favor of the credibility of one speaking in extremities;⁷⁸ every man is presumed to know the law;⁷⁹ every

74—*Concordare leges legibus*, etc.; *Benedicta est expositio quando res redimitur a destructione*.

75—*Quod est inconveniens aut contra rationem non permixtum est in lege*.

76—*Omnia præsuntur rite*, etc.; *Res ipsa loquitur*; *Probat extremis præsuntur media*; C. v. Kane: 183.

77—*Coffin v. U. S.*; *Bonnell*: 185; *Nemo præsuntur malus*.

78—*See DYING DECLARATIONS*; *Nemo præsuntur ludere in extremis*.

79—*Ignorantia legis neminem excusat*; R. v. Esop.

68—*Cessante ratione legis cessat ipsa lex*; *Ratio est radius divini luminis*; *Verba nihil operari melius est quam absurdi*; *Uno absurdo dato infinita sequuntur*; *Lex neminem cogit ad vana seu inutilia peragenda*; *Concordare leges legibus*, etc.

69—*In præsentia majoris cessat potentia minoris*.

70—*Ignorantia legis*, etc.

71—*Salus populi suprema lex*.

72—*Necessitas inducit privilegium*, etc.

73—*Summa ratio*, etc.; *Trist*: 214.

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presumption is against a judgment and its foundation in proving an estoppel or title to property;⁸⁰ every one is presumed to intend the natural, direct and probable consequences of his act, is a universal rule;⁸¹ every presumption is against a pleader;⁸² every presumption is against a wrongdoer: *Omnia præsumuntur contra spoliatores*.⁸³

The law of constructive notice, one of the conserving principles, affords many illustrations of the influence of convenience upon procedure. Prolixity is to be avoided, is a rule of convenience and of morality.

Aider by pleading over or by verdict in cases at law also illustrate the law of convenience. It will be presumed that incidental facts were proved, without which no verdict could have been found provided the record contains terms sufficiently general to comprehend them in fair and reasonable intendment.⁸⁴

The right of litigating parties to stipulate a procedure for themselves depends upon the law of convenience.⁸⁵ Also the law of depositions, and service of process by publication.

After the commencement of a suit parties are charged with the course of the practice of the court until they are dismissed *sine die*.⁸⁶

The mandatory record is conceived to serve many requirements of convenience, as will appear from a consideration of the conserving principles of procedure.

For convenience one may waive process and enter his appearance and thus give the court jurisdiction of the person.⁸⁷

Surplusage in a record is prolixity, is burdensome and inconvenient. Therefore it may be stricken therefrom.

80—Clem: 2c; Pennoyer: 58; Deputron: 121.

81—1 Gr. Ev. 18, n.; Scott v. Shepherd (Tort); Swift v. Tyson (commercial paper); Hadley v. Baxendale (contract); P. v. Rogers; C. v. York: 197; Spies v. P.; Lawrence v. P. (crime).

82—*Verba fortius*, etc.; U. S. v. Cruikshank: 232; Moore v. C.: 21; Dovaston: 217.

83—Armory: 180.

84—1 Gr. Ev. 19: cases; Spieres v. Parker, sub Rushton: 5: cases.

85—See STIPULATIONS; WAIVER.

86—See JURISDICTION.

87—Quinn v. P.

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For convenience judicial notice is taken of many matters.⁸⁸

Ignorance of law is no excuse (Ignorantia legis neminem excusat). A pleader must rightly conceive, present and describe a wrong, a wronged person and a wrongdoer. He must know what a court is created for, why it convenes and sits, considers and adjudicates; that it can act only upon a cause of action, and that this must be presented by the right record; that the code provision that the statement (complaint or petition) shall state facts sufficient to constitute a cause of action in ordinary and concise language and without repetition, is one that has many phases. A part of it is constitutional, is mandatory, while other parts of it are directory. Some of these may be waived while other parts cannot be.

That the cause of action must be described, presented and proceeded with consistently, agreeably to the record rule, the mystic rule and the *coram judice* rule already mentioned, also consistently with the conserving principles of procedure. Consequently the pleader must know those rules and those principles and how they act upon and are reacted upon by the requirements of government. He must know how all these matters interweave and interlace, also how the conserving principles are safeguarded and provided for by the operations of the general demurrer, the motion in arrest of judgment and finally upon collateral attack. Without more, this enumeration will indicate that a practitioner must master many matters before he can properly conduct a cause. He is charged with a knowledge of the law, and he pleads his cause of action at his peril. Its depths may be judged from a careful consideration of the conserving principles of procedure. These will indicate the heights, depths and breadths involved. Throughout all these he is inexorably charged with a knowledge of the law, and especially the operation of the three paramount rules already introduced and explained.

Interlaced throughout the above matters is that very important rule,

88—Lanfear: 181; Olive v. S.: 182; see JUDICIAL NOTICE.

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what is not juridically presented cannot be judicially considered. The cause of action or ground of defence must appear.⁸⁹ This is substance or essence. But other parts of the above code provision involve formal matters, which may be waived or condoned. The forms of the law are a part of the law.⁹⁰ But a court prefers to overlook these and not delay over them. Accordingly they are held waived unless promptly, aptly and precisely objected and excepted to or there applies a rule of great import to a practitioner.⁹¹ This rule involves the exclusive matters and functions of the bill of exceptions, or the statutory record which should be familiar to every lawyer.

The contumacy of those who disobey him who gives a judicial decision is liable for the judgment given.⁹²

Failing to deny the allegation of a pleading admits it; this admission on the record is conclusive.⁹³ One who does not speak when he ought shall not be heard when he desires to speak.⁹⁴

Defences not pleaded are waived.⁹⁵ One is presumed to intend the natural, direct and probable consequences of his act is a basic idea of many rules of procedure.⁹⁶ The rule in *Scott v. Shepherd* has many aspects; it involves the above rule of presumption, which is of much significance.

The code is a system of unification, simplification and expedition; its leading distinctions and characteristics are more verbal than substantial. This appears from the facts that it conforms to requirements of *Magna Charta*, constitutions, the high policies of procedure, statutes, the common law, of course including the leading maxims or principles already referred to. § 29, Hughes' Proc.

The nomenclature is modern, but the ends to be subserved are from of old; the idea is the same. See CODES; CONSTRUCTION.

- 89—*De non apparentibus*.
- 90—Planing; 2d.
- 91—*Consensus tollit errorem*.
- 92—1 Gr. Ev. 18, n.; *Scott v. Shepherd* (Squib Case); *Qui ponit fatetur*.
- 93—Bradbury; 35.
- 94—Bro. Max. 138; *Allegans contraria non est audiendus*; see ESTOPPEL; ADMISSIONS; DENIALS; ISSUES; WAIVER.
- 95—Cromwell; 26; Field v. Mayor; 84.
- 96—1 Gr. Ev. 18; *Contumacia eorum*; *St. citatus aliquis*; McAllister; 3; Spies v. P.; P. v. Lawrence.

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tion; Melius petere fontes quam sectari rivulos.

Practice; Procedure. See EXAMINATION OF WITNESSES.

PROCESS: Jurisdiction is acquired by process or an appearance. *Audi alteram partem*; Pennoyer; 58; Title Co., 150 Calif. 199, 119 Am. St. 199.

May issue and be served on Sunday. § 51, Gr. & Rud. May be waived. § 53: CONVENIENCE, Gr. & Rud.; Quinn v. P. Depends on a record. §§ 99, 115, 122, 152, 153, Gr. & Rud. Certainty required by constitutions. §§ 152-159, Gr. & Rud.

Without appearance it is essential for jurisdiction. See SUMMONS. Appearance waives process. Galpin; 63; Thomas v. Citizens' Bk.; Quinn v. P. Infant cannot waive. Galpin; 63; Harkness; 152. See ABATEMENT. Must be served in state. Ableman. Federal courts may issue to any state. R. S. U. S., § 738; Pennoyer; 58; Brown, Jurisdic.; Ald. Jud. Writs.

Regular process. 2 Bouv. 862; Savacool; 164; *Necessitas inducit privilegium*, etc. What is regular process. See SEALS; WARRANTS; Ald. Jud. Writs. How served on a prisoner. White, 125 N. C. 25, 46 L. R. A. 706, ext. n. Defects in; jurisdiction. Sanford v. S.

Non-residents not subject to. See NON-RESIDENTS; ATTACHMENT.

Style of title of process. Ald. Jud. Writs. 16-21. Must conform to record. See EXECUTION. Warrant of commitment must. See WARRANT.

Filing brief is a waiver of process. Loucheim v. Seeley (1898), 151 Ind. 665, 667.

Process essential to protect an officer. Savacool; 164; Blair; 170; Tarble's Case; 247. Return of process essential for defense of officer. Six Carpenters' Case; 165.

Tampering with process destroys its protection. Leachman, 81 Ill. 324, Cool. Torts. 546; *Necessitas*, etc.

Warrant of commitment must be sufficient. See WARRANT.

Arrest; when essential for. See ARREST.

Abuse of process; liability for. Bradshaw v. Frazer (1901), 113 Iowa, 579, 86 Am. St. 394-411, ext. n.; Grainger; Nix; McCordle.

Failure to execute; burden of proof; damages. Beck, 121 Ga. 287, 3 L. R. A. (N. S.) 420-432, ext. n.

Generally: 2 Bouv. 766; And. Dic. 817-825.

PRODUCTION OF DOCUMENTS: R. v. Elworthy (1867), L. R. 1 C. C. R. 103, 10 Cox, C. C. 579, 11 Rul. Cas. 442-449, n.; 2 Bish. Cr. Proc. 934; Rapal. Law Dic., Best, Ev. 611; 1 Whart. Ev. 160; 2 Bish. Crim. Proc. 934, 2 Bouv. Dic. 768-769, 1 Gr. Ev. 560-562; 1 Wh. 737; 1 Tay. 419-426.

Notice to produce papers. 2 Bouv. Dic. 518. Elworthy; Wig. Ev. Exceptions: 1.

If suit is for the document, as trover or replevin for a deed, the action is a notice and description of contents. *Lex neminem cogit ad vana*.

2. In an indictment for stealing a document, notice is unnecessary; for here the pleadings charge the defendant with possession. 15 Fed. Rep. 721, 1 Gr. Ev. 561; R. v. Aitchels, 1 Leach, 294. Or, in an indictment for administering an unlawful oath, where it appeared that the defendant read the oath from a paper, oral evidence of what the defendant in fact said was held to be sufficient with-

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out giving him notice to produce the paper. *R. v. Moore*, 6 East. 419. And of course where the existence of a document is denied by a party it is useless to give notice. But otherwise, where evidence is given of alterations and contents in order to show wilful perjury.

Notice may be oral. *Smith v. Young*, 1 Camp. 440.

Time of notice must be reasonable, under the circumstances of each case. *Cessante ratiocine*, etc. *R. v. Ellicombe*, 5 C. & P. 522 (24 E. C. L. R.). May be served upon party or his attorney before trial. 1 Gr. Ev. 562, 15 Fed. Rep. 721. One half day insufficient, when prisoner lives thirty miles away. *R. v. Kitson*, Dears. 187. It should be given in time, and generally before trial, and upon the same rationale as of a *subpoena duces tecum*.

Paper must be called for at the hearing, and not before. Generally their admission is compulsory. 1 Gr. Ev. 563, 1 Tay. Ev. 1614.

Right of party producing, upon notice, to use and control. *Smith*, 131 N. Y. 169, 15 L. R. A. 138, n. Admission of party will dispense with. 1 Gr. Ev. 96, 97.

Refusal to produce; consequence. *Hanson*, 2 How. 653. One who does not obey the law cannot have its benefit. Note, 11 L. ed. 652. See *Armory*: 180. One refusing to produce cannot afterward introduce the document.

Generally: *Wade on Notice*, 1252-1292, 6 Encyc. Pl. & Pr. 781-818; *Lowenstein*, 12 Fed. Rep. 811, n.; *Wertheim v. Continental Co.* (1883), 15 Fed. Rep. 716-730, ext. n.; *Adams*, Eq. 135, 1 Tay. Ev. 419-426 (seven exceptions stated); § 724 R. S. U. S.; *R. v. Gibson*: 272 (original telegram must be produced).

PROPERTY: Of the person. 6 Crim. Law Mag. 804-815. *P. v. Gardner*, 144 N. Y. 119, 28 L. R. A. 699 (prisoners may be inspected); *McQuigan*, 129 N. Y. 50, 26 Am. St. 507, n., 5 Am. R. R. & Corp. Rep. 185-191, n., 14 L. R. A. 446; *R. v. Botsford* (1891), 141 U. S. 250, 4 Am. R. R. & Corp. Rep. 645. See *DEPARTURE*: cases. *Res ipsa loquitur*.

Profert and oyer in modern practice. *Riley*, 58 W. Va. 213, 1 L. R. A. (N. S.) 777, n.

PROPERT IN CURIA: He produces in court. 2 Bouv. Dic. 769; *Austin v. R. R.*

PROHIBITION: *S. v. Commissioners of Roads* (1817), 1 Mill (S. C.), 65, 12 Am. Dec. 596-609, ext. n.; *Walcott*, 21 Nev. 47, 37 Am. St. 478, n., 9 L. R. A. 59; *Mech. Pub. Off.* 1012-1020; *Bullard*, 66 Vt. 599, 25 L. R. A. 605, 2 Bish. Cr. Proc. 1404, 1406, n., *High*, Ex. Rem., 2 Bailey, Jurisdic. 445-461, *Hayne*, Appeal, 311-318. See *Certiorari*; *Supersedeas*; *Havemeyer*, 87 Cal. 267, 25 Pac. 433 (general discussion); *Brown*, Jurisdic. 508-620; *Quimbo*, 20 N. Y. 532.

Unwarranted assumption of jurisdiction prevented by. *Wilkins*, 75 Vt. 42, 52 Atl. 1048, 98 Am. St. 804 (*res adjudicata* matters not protected by). See *Certiorari*; *Habeas corpus*.

Coram non judice proceedings subject to. *P. ex rel. L'Abbe v. District Court*, 26 Colo. 386, 46 L. R. A. 850; *P. ex rel. Long v. District Court*, 28 Colo. 161; *P. v. Dis. Ct. Lake Co.* (1902), 29 Colo. 277, 93 Am. St. 61, n. *Disqualified judge may be restrained by.* *S. v. Board*, 19 Wash. 8, 67 Am. St. 706-722, n., 40 L. R. A. 317.

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Prohibition may issue to prevent a court from vacating its judgment after the term. *S. v. Superior Court*, 19 Wash. 128, 67 Am. St. 724. And proceeding with a case after final judgment and the parties are dismissed *sine die*. *P. v. District*, *supra*. *Liquor law*; prohibition of. And. Dic. 823-832.

Generally: 40 Wash. 555, 111 Am. St. 925-978, ext. n.; 2 Bouv. Dic. 772, 773; And. Dic. 823. See *Certiorari*; *Habeas corpus*.

PROXIMITY: Is to be avoided. *Green*: 90; *C. v. Kane*: 183: cases; *Cryps* (rule stated); *Sturges*: 111; 2 Bouv. Dic. 300 (certainty); *Sto. Pl.* §§ 277, 285, *Hughes' Proc.*; § 53: **CONVENIENCE**; 254, *Gr. & Rud.*

Sham pleading is a contempt. *Graver*: 103; *Brown*: 105.

Evidence need not be pleaded. *Green*: 90. The court is presumed to know the law; it is implied. *Green*: 90. See **PRESUMPTIONS**.

General allegations to avoid. See *Dobson*: 232a; *Omne majus*, etc.

Reference from one count to another. L.C. 253, 256; *R. v. Waverton*: 70; *R. v. Waters*: 71. See *Verba relata*; **COUNTS**; **BILLS OF PARTICULARS**. §§ 13, 277, *Hughes' Proc.* "Then and There"; uses of. *R. v. Waters*: 71.

Abbreviations and figures may be used. *Berrian v. S.*, 2 Zab. (N. J.) 679, 1 B. & H. Lead. Eq. Cas. 107-118, n.; 1 Bish. Cr. Proc. 344.

Abstracts of records only need be printed, if parties so agree. *Rule*: Sup. Ct., 120 U. S. 785. Rules like this should be made compulsory. Great abuse is found by the incorporation of surplage. See *Utile*, etc.

Striking out, for prolixity. *Mews' E. C. L.* 898.

Evidence; proofs; when it should be avoided. *C. v. Kane*: 183. §§ 13, 277, *Hughes' Proc.*

PROMISSORY NOTES: Commercial.

PROMOTERS: Contracts of. See *Keach*; *Pasley*: 375.

PROOF: 2 Bouv. Dic. 780; 6 Cyc. 334.

PROPERTY: Sovereign power cannot take the property of one man and transfer it to another. *Taylor*: 219a; *Allen v. Jay*; *Hutcheson*, 92 Tex. 685, 71 Am. St. 884, stating *Norwood*, 172 U. S. 268 (limitations to tax). Protection of. *McClain*, C. L. q. v.

PROTECTION DUE FROM GOVERNMENT, from its agencies, from taxation. See **GOVERNMENT**. §§ 122, 126, 187, *Hughes' Proc.*

Protection the purpose of government. See **DUE PROCESS OF LAW**.

Protection depends on certainty. §§ 153, 267-268, *Gr. & Rud.* Government is ordained for. §§ 267-268, *id.* Judicial officers protected. *Lange*: 159. Executive officers. *Savacool*: 164.

Persecution; judicial shams, frauds and mockeries. *Windsor*: 1. The genius of government is protection. Intelligence and morality. See **GOVERNMENT**; **MORALITY**. "Justice, sir, is the greatest interest of man on earth."

PROTEST: 7 Cyc. 1051-1064. Payment under. 2 Bouv. Dic. 787.

PROTESTATION: Allegations which cannot be pleaded as estoppel. *Sto. Eq. Pl.* 694, And. *Steph. Pl.*, pp. 278, 279. In a demurrer. *Sto. Eq. Pl.* 457. Must not be repugnant to the pleading which it accompanies. And. *Steph. Pl.*, 279.

- PROVIDENT LIFE AND TRUST CO. v.** Mercer County (Municipal bonds; authority of must appear of record): L.C. 89.
- ✓ **PROVINCE OF COURT AND JURY:** See *Ad questionem*, etc.; S. v. Croteau: 271; Schick v. U. S.; Bonnell: 185; cases.
- ✓ **PROVISOS IN STATUTES;** how pleaded. See EXCEPTIONS AND PROVISOS; C. v. Hart: 227; Bro. Max. 677-679; 1 Kent, 463.
- PROVOCATION:** See WORDS; Stephens v. Myers. As an excuse for crime. McClain, C. L., q. v.
- Words of provocation may be considered in mitigation of punitive, but not compensatory, damages. Mahoning R. R. v. De Pascale (1904), 70 Ohio, 179, 65 L. R. A. 860; cases.
- PROXIMATE CAUSE:** See *In jure non remota*; CAUSATION; REMOTENESS; PRIVILEGE. Thomas v. Winchester; Winterbottom.
- ✓ **PUBLICATION:** Service of process; notice by. Ricketson: 59; *Coffin v. Bell* (1894), 22 Nev. 169, 58 Am. St. 738; Frisk, 75 Wis. 499, 17 Am. St. 198, n.; Galpin: 63; Pennoyer: 58; Brown, Jurisdic.
- Mandatory record must affirmatively show the facts.* McGahen v. Carr (1858), 6 Iowa, 331, 71 Am. Dec. 421, n.; Van Fleet, Coll. Att. 330-383; Palmer, 13 Mont. 184, 40 Am. St. 434, n.; Wade, Notice, 1025-1089; Moyer, 2 Ind. Ap. 571, 16 L. R. A. 231-236, ext. n.; Rorer, Interstate Law, 178. See Hartzell, 6 N. Dak. 117, 66 Am. St. 589, n. (stating Cooper v. Reynolds and Pennoyer: 58).
- Every presumption is against the mandatory record.* De non apparentibus; Dovaston: 217. See *Res Adjudicata*; Harrow v. Grogan (Ill.).
- Constructive or substituted service of process; publication; posting; mailing. Ald. Jud. Writs, 141-146.
- Affidavit and order for, should be in record proper. Galpin: 63. See Cooper v. Reynolds. Regularity and continuity essential for. Welty, Assess. 224; Galpin: 63. See Cooper.
- History of.* Galpin: 63.
- PUBLICATION OF SUMMONS:** And. Dic. (Service); Galpin: 63. Computation of time. 2 Bouv. Dic. 500. Affidavits for: requisites. Ricketson: 59.
- Newspaper; what is.* 2 Bouv. Dic. 500; Crowell, 22 R. I. 51, 84 Am. St. 815.
- Of notice.* § 53; CONVENIENCE, Gr. & Rud.
- PUBLIC CONTRACTS:** One cannot act where he is interested. Keech v. Sandford; cases.
- Municipal corporations;* contracts to lowest bidder; rights of. Ingle v. Board, etc. (1902), 135 Ala. 187, 33 So. 678, 93 Am. St. 20-30, n.
- PUBLIC POLICY:** See CONSERVING PRINCIPLES; *Salus*, etc.; §§ 46, 50, 100, Gr. & Rud. A ground and rudiment of the law. §§ 47, 50, 313, Gr. & Rud.
- Evidence excluded from public policy.* 1 Ell. Ev. 621-647.
- Contracts restrained by.* Greenhood, Public Policy; Eddy, Comb.: §§ 14-19, Hughes, Conts. See SUPREME LAW OF THE LAND; Ans. Conts. 171, 183-189; 2 Beach, Conts. 1498-1561. What it is. 1 Eddy, Comb. 62-70; 2 Bouv. Dic. 792. A constitutional law is not void for. Jullen, 116 Wis. 79 (stating Edgerton v. Brownlow).
- PUBLIC RECORDS AND DOCUMENTS** as evidence. 1 Gr. Ev. 499-556; 1 Ell. Ev. 404-420. See MANDATORY RECORD; AUTHENTICATION; CERTIFICATES.
- PUEBLO COUNTY v. GOULD** (1895), 6 Colo. Ap. 44. Conclusions of law need not be denied. P. *ex rel.* Brown (Posey; Colo.). Are not aided by denials. *Denials* must not be too narrow. Doll; Bowlus: 100.
- PUIS DARRIEN CONTINUANCE:** See SUPPLEMENTAL PLEADINGS. Matter in; nature of may be presented in equity. Sto. Pl. 903, 905.
- At common law this plea operated as an abandonment of all other defenses. Crawford, 195 U. S. 176 (rule in Illinois). This absurd result is not countenanced under codes.
- PULLMAN CO. v. ADAMS** (1898), 120 Ala. 581, 74 Am. St. 53, n. (liability of sleeping-car company for stolen goods, as innkeepers).
- PUNCTUATION:** Suth. Stat. 232; Roe v. Tranmarr; 2 Bouv. 795; And Dic.
- Punctuation is to be followed. 2 Whart. Conts. 651. The true meaning and intent of a statute is to be ascertained from the whole purview, and to ascertain such meaning and intent the court will punctuate, or disregard punctuation, as may be necessary. Union, 18 Utah, 378, 48 L. R. A. 790.
- PUNISHMENT:** McClain, C. L., 2 Bouv. 795; And Dic., 1 Bish. C. L. 935, 947.
- Cruel and unusual punishments; Federal Constitution does not apply to states.* McDonald, 173 Mass. 322, 72 Am. St. 293, n.; Barron: 241; New Mexico, 10 N. M. 718, 55 L. R. A. 90; cases; Kemmler, 136 U. S. 436; Wilkerson, 99 U. S. 130; Cool Const. Lim. 36; Tiede. Pol. Power, 23, 24, n.
- Nobiles magis plectuntur pecunia; plebes vero in corpore:* The higher classes are more punished in money, but the lower in person. 3d Inst. 220.
- PUPILLUS PATI POSSE NON INTEL- ligitur:** A pupil is not considered able to do an act which would be prejudicial to him. Dig. 50, 17, 110, 2; 2 Kent, 245. In no way can an infant waive the service of process. Galpin: 63. For him it is a mandatory requirement. See INFANTS.
- PURCHASER WITHOUT NOTICE NOT** obliged to discover to his own hurt. See 4 Bouv. Inst. n. 4336; *Infra præsidia*. This rule is exactly applicable to commercial paper. Swift; Miller v. Race. But not to the purchaser of other property. LeNeve: 396; Bassett: 395; Williamson v. Brown. If one is put upon notice of an unregistered deed he must enquire after it. He cannot shut his eyes and refuse to look and then be protected.
- PURPRESTURES:** Remedy. Revell v. P. (1899), 117 Ill. 468, 69 Am. St. 257-281, n.
- PUSEY v. PUSEY:** L.C. 276.
- PYM v. CAMPBELL:** L.C. 52.
- QUANDO ALIQUID PROHIBETUR,** prohibetur omne per quod devenitur ad illud: When anything is prohibited, everything by which it is reached is prohibited. 2d Inst. 48; Bro. Max. 489. Illey: 169.
- QUANDO ALIQUIS ALIQUID CON- cedit,** concedere videtur et id sine quo res uti non potest: When a person grants a thing, he is supposed to grant that also without which the thing cannot be used. Bouv. Dic. (Statute); 3 Kent, 421; *Expressio eorum*, etc.
- QUANDO JUS DOMINI REGIS ET** sub diti concurrent jus regis præferri debet: When the right of the sovereign and of the subject concur, the right of the sovereign ought to be preferred. Bro.

Quando Jus Domini.—

Max. 89-72; Giles v. Grover; R. v. Cotton; S. v. Foster; 1 Coke, 129, Co. Litt. 30b. See GOVERNMENT.

QUANTUM MERUIT: Right to abandon entire contract and sue upon. Cutter; 308; Ans. Conts. 278; 2 Bouv. Dic. 801.

QUARANTINE: 92 Am. Dec. 76-80; Miller v. Horton, Cas.; And. Dic. 849.

QUARMAN v. BURNETT: Sub M'Manus. **QUASH:** And. Dic. Motions for. 1 Bish. Cr. Proc. 757-774, Whart. Cr. Pl. & Pr. 385-397, Clark, Crim. Proc. 124-126; 2 Bouv. Dic. 803.

Substance not waived by omitting to file motion to quash. C. v. Eastman; 22.

QUASI CONTRACTS: See Boston Ice Co.; 320; Cutter; 308; IMPLIED CONTRACTS; SURETIES; SUBROGATION; CONTRIBUTION AMONG SURETIES; WAYS OF NECESSITY; INFANTS. 2 Page, 771-748 (implied and quasi contracts).

Waiving a tort and suing in assumpsit. Smith v. Hodson; 156; *Expressio eorum*, etc. See TORTS.

Implied contracts from original compacts. See DUE PROCESS OF LAW; § 27a, Hughes, Conts.; SUPREME LAWS OF THE LAND; *Sic utere tuo*, etc.; COLLATERAL ATTACK.

A source of contract. Ans. Conts. 8. Kinds of, assimilated to true contract in pleading. Ans. Conts. 365, 366.

Implied contracts for sale and service. 2 Whart. Conts. 707-721.

Rights under reserved judgments. See MONEY HAD AND RECEIVED.

QUASI MUNICIPAL CORPORATIONS: Liability for. 2 Bouv. Dic. 804; Hill v. Boston; 2 Page, Conts. 1006-1064.

Not debtors by implication. Wortham, 13 Bush (Ky.), 53; Hyatt, 123 Ia. 292, 100 Am. St. 354, n. (county liable for fees of attorney appointed to prosecute).

QUEEN'S CASE, THE: L. C. 53c.

QUESTIONS OF LAW AND FACT: *Ad questionem facti*, etc.

QUIA TIMET ACTIONES: R. R. (Memphis R. R.) v. Greer; 283; Pusey; Bishp. Eq. 568-582, 2 Sto. Eq. 825-851, 2 Pom. Eq. 1427, 3 Encyc. Pl. & Pr. 599, 600, Bouv. Dic. (Bill *Quia timet*); And. Dic.

QUI CONCEdit ALIQUID, CONCEdere videtur et id sine quo concessio est irrita, sine quo res ipsa esse non potuit: He who grants anything is considered as granting that without which his grant would be idle, without which the thing itself could not exist. See INCIDENTS; *Cumcunque aliquis quid*, etc.; *Quando aliquis*, etc.; *Quando aliquid conceditur*, etc.; *Expressio eorum*, etc.

QUICQUID PLANTATUR SOLO, SOLO cedit: Whatever is affixed to the soil belongs thereto. Bro. Max. 401-431. See FIXTURES; Elwes; Horn v. Baker; *Cujus est solum*.

This maxim expresses an important rule of real estate law, as will appear in the discussions of Fixtures. See Elwes v. Mawe; Wigglesworth v. Dallison; 399.

Improvements; betterments; owner of land takes from the occupant when. Bright v. Boyd; Kinkhead v. U. S.

Emblements; growing crops; timber. Pass as incidents of the estate. Crosby v. Wadsworth (growing crops, when personally); Wigglesworth; 399; Garth v. Cotton.

Aerolite becomes realty upon the land where it falls. Goddard v. Winchell.

What is real estate and what is personality is of consequence in discussions of the Statute of Frauds. Crosby.

QUICQUID SOLVITUR, SOLVITUR SECUNDUM MODUM solventis: Whatever is paid is to be applied according to the intention of the payer. Bro. Max. 810-816; Field; 387. See APPLICATION OF PAYMENTS; *Quicquid recipitur*, etc.

QUIETA NON MOVERE: Not to unsettle things which are established. See *Stare decisis*.

QUI JUSSU JUDICIS ALIQUOD PERCERT non videtur dolo malo fecisse, quia parere necesse est: He who does anything by command of a judge will not be supposed to have acted from an improper motive, because it was necessary to obey. Bro. Max. 93-102; Savacool; 164; Grace; Brown, Jurisdic.; Telefsen v. Fee; Freeman v. Howe; 287; Buck v. Colbath; Dig. 50, 17, 167, 1.

QUILIBET POTEST RENUNCIARE juri pro se inducto: Anyone may renounce a law introduced for his own benefit. To this rule there are some exceptions. Bro. Max. 699-706; J'Anson; 91; McKyring; 33; Shutte; 291. *Modus et conventio*, etc.; *Consensus tollit errorem*. Max. 13, §§ 169a, 298, 303-305, Hughes' Proc. See Quinn v. P.; WAIVER.

QUINCY v. BOYD (1884), 8 Colo. 194. Jerome, 21 Colo. 322. *A reply can be waived.* See REPLY. Hume. All pleadings can be waived. Holman, 8 Colo. Ap. 285, 286. See THEORY. An answer can be waived. Berdell (Colo.); Hume; cases.

QUINN v. P. (1893), 146 Ill. 275, 281. Cited, § 53; CONVENIENCE, Gr. & Rud.

Process may be waived and jurisdiction given by consent. "The law clothes the judge with jurisdiction of the subject-matter, and when the prisoner was before him, no matter how he came there, he had jurisdiction of the person, and then his jurisdiction was complete." Mix v. P. (1861), 26 Ill. 32; S. v. Schrader, 73 Neb. 618, 119 Am. St. 913 (motion to dismiss for want of motion for a new trial).

The statutory command was to the justice of the peace to issue a summons, have it served and returned in order to acquire jurisdiction. Nevertheless all of that ceremony is directory if the defendant appears. Bliss v. Harris (1873), 70 Ill. 343. It is also held that one cannot waive a summons and appear.

An appearance waives summons. Burson, 20 Mich. 415; Swartwout, 5 Hill, 118; Malone, 2 Hill, 657. See WAIVER; *Quilibet potest renunciare juri pro se inducto*.

QUINN v. P. (1906), 220 Ill. 28-31.

Quinn stated: Prisoner's right to speedy trial; construction of statute. Q. and accessories were committed in January for burglary; at the February term of the court all were indicted; they had the case continued to the June term, when two were convicted, but Q. having secured a separate trial, and also succeeded in quashing the array and panel of jurors, the case was continued to the September term, when his case was set for trial on the 17th, then the state secured a continuance because of the absence of a material witness to the November term, at which Q. asked for a discharge under a statute (§ 13, Crim. Code, Hurd's, 1903), which provided that one imprisoned four months must be tried at a following term, which right had been denied; to this was added a further motion to quash the array and panel; however, he was tried and convicted. Upon error he sought a re-

Quinn v. P.—

versal upon the ground that he was committed in January and was continuously imprisoned, all the time, and that under the foregoing statute he must have been convicted before the November term. The court observed: "The statute provides exceptions to its operations dependent upon continuances obtained by a prisoner, or absence of prosecuting witnesses which could not be procured but which may be at a later term. In this case each of these exceptions are to be considered. Wisely, the legislature expressly excepted what the prisoner himself brings about." *Nullus commodum capere potest de injuria sua propria* (no one shall take advantage of his own wrong). Dilatory tactics were all the time before the court and this fact must be considered. An impossibility arose in September, namely, the absence of a material witness.

For the due administration of justice the laws of impossibility and of necessity must always be taken into account. *Lex non cogit ad impossibilia*; *Necessitas inducit*; Langabier: 174a. These conclusions are reached by liberal construction from the grounds and rudiments, therefore the case was justly affirmed.

Statutes and codes must be construed for reason (Cessante ratione) and other requirements of the prescriptive constitution. End. Stat. 182; Indianapolis: 223.

The foregoing decision is open to the criticism that it conceded that, had the legislature not provided for contingencies arising from reason, necessity and impossibility, then the court would have had no alternative. It concedes too much power to the legislature by narrowing juridical power for the due administration of justice. See Rushton: 6; C. v. Hess: 215; Oakley: 222; Indianapolis: 223; Bates: 225.

The letter of a statute or of a constitution should be departed from if thereby fundamental principles are vindicated. *Lex non exarctat*; Church; Indianapolis: 223. **PRESCRIPTIVE CONSTITUTION.** *Ita lex scripta est* governs unless a fundamental principle is impaired or denied.

QUI NON IMPROBAT, APPROBAT: He who does not disapprove approves. 3d Inst. 27. See ACQUIESCENCE; ACCESSORY; Consensus, etc.; WAIVER.

QUI NON NEGAT FATETUR: He who does not deny admits. Traymer, Max. 503. See DENIALS; *Quod ponit fatetur.* Codes reaffirm this. See ADMISSIONS.

QUI PER ALIUM FACIT PER SEIPSUM *facere videtur*: He who does anything through another is considered as doing it himself. Bro. Max. 816-842; Smith, Conts. 430; Reinh. Ag. 21; Thomson: 342; Rossiter; Batty; Cherry v. R. R. (connecting lines); Clark v. Des Moines; Collen; Polhill, *sub* Sturdivant; 410 (agent—how to execute commercial paper); Angle v. N. W. Ins. Co.; Bloom: 266; Keech; Michoud; Smout; De Benham; Manby; Montague; Seaton (married women); Brookshire, *sub* Hibblewhite; Ross v. Houston; Le Neve: 396 (notice to agent is notice to principal); Peters v. Fleming (infants can contract for necessities); Elwell v. Shaw (how execute a deed); U. S. v. Gooding: 202 (agent as a witness to bind principal); Cornfoot: 385; M'Manus (torts of agent; when principal liable for); Craker (assault of agent; when principal liable for); Greg-

Qui Per Alium.—

ory v. Piper (*Respondet superior*); Limpus (general and special agents; Batty v. Carswell); R. v. Almon; P. v. Robey (criminal acts of agent; when principal liable for); C. v. Neal (coercion of wife); Hilliard (*Respondet superior*), *sub* M'Manus; 1 Bish. C. L. 301. See AGENCY. §§ 298, 302, Gr. & Rud.

Liability of principal for unauthorized acts of agent. Franklin Fire Ins., 201 Pa. St. 32, 88 Am. St. 770-799, ext. n. (contract; tort; criminally); M'Manus: cases. *Principal not bound upon oral contract of agent when the contract must be in writing.* Hyde, *sub* Worrall: 390.

QUI PONIT FATETUR: The points he alleges are admitted. Langd. E. Pl. 33; *Qui non negat fatetur.* Cited, §§ 49, 198, 271, 278, Gr. & Rud. See DENIAL.

QUI PRIMUM FECIT ILLE FACIT RIXAM: He who first offends causes the strife. Squib Case; Bull; C. v. Selfridge. Cited, Bish. C. L.

He who is first at fault must suffer a loss; or, as the equity is usually expressed, when one of two equally innocent persons must suffer from the wrong of a third, he who first trusted must first suffer. Lickbarrow: 394; Swift; S. v. Baker; Stewart v. S. (1850), 19 Ohio, 302, Hor. & Thomp. Cas. Self Def. (1 Crim. Def.) 191, 53 Am. Dec. 426, 430, n.; Rowe v. U. S. (1896), 164 U. S. 546, (retreating to the wall). § 346, Hughes' Proc. In *jure*.

Cited, §§ 55, 293-295, Gr. & Rud.

QUI PRIOR EST TEMPORE POTIOR *est jure*: He who is first or before, is stronger in right. Bro. Max. 353-365. C. v. Hite; Compton v. Jones; Brice: 398; Whitworth; Holman: 363; Armory: 180; Twyne's Case; Le Neve: 396; Lickbarrow: 394; Williamson v. Brown; Keech v. Hall; Moss v. Gallimore; Filley v. Duncan; Franklin Bank v. Bacheider; Lester: 341; Freem. Judg. 369; Coke, Litt. 14a, Story, Eq. 64d, Story, Bailm. 312, Ewart, Estop. 290-295.

Max. No. 36, Hughes' Proc.; §§ 40, 124, Gr. & Rud.

Wages: Employees of a corporation have priority of claim over bondholders. Drennen, 115 Ala. 592, 67 Am. St. 72, n.

What claims have priority over stockholders. Bank v. Cook, 12 Wyo. 492, 2 L. R. A. (N. S.) 1012-1072, ext. n.

Priority of government. See GOVERNMENT; *Quando jus*; Ryall: 397: cases (assignments).

Qui prior est tempore, etc., applied where a succession of county warrants were issued in payment for property, and some of them were fraudulent. The holder of the first could recover. Auerbach, *sub* *Ultra vires*.

QUI SEMEL MALUS, SEMPER PRÆSUMITUR ESSE MALUS in eodem genere: He who is once bad is presumed to be always so in the same degree. Cro. Car. 317; Best, Ev. 345. Continuity of character is presumed. CONTINUITY.

QUI SENTIT COMMODUM, SENTIRE DEBET ET ONUS: He who derives a benefit from a thing ought to bear the disadvantages attending it; or, he who derives the benefit must stand the burden. Bro. Max. 705-712; Weet, *sub* Hill v. Boston; Hitchcock; Bauerman: 48; Thomson: 342; Limpus; Poulton; M'Manus; Craker; Streatfield; Livingston; Rogers; Gregory, *sub* Hilliard: 1 Sto. Const. 78; R. v. Almon; P. v. Robey; Loan Ass'n; Boering, 193 U. S. 442 (wife getting ticket of husband is bound by notice to him;

Qui Sentit Commodum.—

notice to the agent is notice to the principal); Merchants' Bk.; Ewart, Estoppel, 276-295. See QUASI MUNICIPAL CORPORATION.

Max. No. 32: §§ 239, 306-314, Hughes' Proc., §§ 295, 302, Gr. & Rud. Agent, when liable for his torts to third persons. Harriman.

QUIS, QUID, CORAM QUO, QUO JURE

petatur, et a quo.

Recte compositus quisque libellus habet:

Every complaint correctly drawn must show who seeks relief, what it is that he seeks, in what court he seeks it, by what right he claims it and from whom he asks it. Sto. Pl. 25; Com. Dig. Chancery, E. 2; Cooper, Pl. 17, note 1; Sayle's Tex. Pl. § 290. § 29, Hughes' Proc., § 225, Gr. & Rud.

The above *distich* is applicable to all pleadings. It answers to the declaration at common law, to the libel or libellus articulatius, of the civil and common law. It equally applies to pleadings under the codes, and to pleadings of a defendant where he files a cross complaint, or statement for affirmative relief. See CAUSE OF ACTION; JURISDICTION; De non; CODES; INDICTMENTS; Verba fortius.

QUI TACET CONSENTIRE VIDETUR:

He who is silent appears to consent. Bro. Max. 138, 787. Silence gives consent. 1 Gr. Ev. 18, n.; Si citatus; Qui non prohibet, etc.; Consensus, etc.; Qui ponit fatetur. See WAIVER.

Qui tacet consentire videtur ubi tractatur de ejus commodo: He who is silent is considered as assenting, when his advantage is debated. Consensus, etc.

QUI TACET NON UTIQUE FATETUR,

sed tamen verum est eum non negare: He who is silent does not indeed confess, but yet it is true that he does not deny. Dig. 50, 17, 142. Silence; effect of when one should speak. See WAIVER; Consensus, etc. Allegans.

QUI TAM ACTIONS: Nature of. McClain, C. L.

QUOD AB INITIO NON VALET IN-

tractu temporis non convalescet: That which was void in the beginning cannot be made valid by lapse of time. Bro. Max. 178-184; 8 Rul. Cas. 191; Suth. Stat. 484; Cool. Const. Lim. 449.

Max. No. 4, §§ 104-109; cited, pp. 11, 22; §§ 5a, 13, 23, 29, 30, 32, 39, 44, 70, 73, 77, 90, 104-107, 109, 113, 169, 169a, 173, 174, 188, 245, 251, 257, Hughes' Proc.; §§ 93, 95, 118, 163, 201a, 205, 216, 225, 230, 237, 271, 272, 278, Gr. & Rud.

COGNATE MAXIMS AND CASES: De non apparentibus; Frustra probatur quod probatum non relevat (it is vain to prove that which can have no effect); Consensus tollit errorem; Debile fundamentum fallit opus; Quod initio vitiosum, etc. Quod ab initio, etc., is not always applicable. 4 Coke, 26. See LACHES; PRACTICAL CONSTRUCTION; Omnis rati habitio, etc.

Shutte: 291; Munday: 79; Sanderson; Windsor: 1; Crain v. U. S. (a formal plea cannot be supplied); Iverslie: 46; Tilton v. R. R.: 133; Ricketson: 59; Pennoyer: 58.

Jurisdiction must be conferred by an initial pleading. It must be given by the right record. What should be set forth in the first statement cannot be gathered and made from those that follow. Devine.

Sto. Pl. 10; Cruikshank: 232; 1 Beach, Eq. 99, 109; Buck, 16 Gray, 555; San-

Quod ab Initio.—

born: 61. See JURISDICTION; PLEADINGS; PROCEDURE; WAIVER.

An indictment, like the bill in equity, must confer jurisdiction upon the court. See INDICTMENT.

Cruikshank: 232; Wheatley: 19; Moore: 21; White v. Wagar: 130; RECORD.

Answers, replies and bills of exception matter will not supply what should appear in the statement of the cause of action and in the right record therefor. Expressio unius.

See CONSTRUCTIVE NOTICE; COLLATERAL ATTACK; REPLICATION; SUBJECT-MATTER; Res adjudicata; REMOVAL OF CAUSES; INDICTMENTS; Debile.

The rule that the general demurrer searches the whole record and attaches to the first fault, means what it says; it is consistent with the above propositions. See DEMURRER; WAIVER. §§ 6-10, Hughes' Proc.; §§ 56-61, Gr. & Rud.

Pleadings—procedure—viewed from res adjudicata and collateral attack (§§ 171-261, Gr. & Rud.) will disclose the philosophy of the mandatory record and why the study of procedure is the study of government.

Theoretically speaking, the king (sovereignty) is always present in court and is really a third party to each and every proceeding. Now, the king is not charged with making objections or taking exceptions as to matters that concern him. Windsor: 1: cases; Nullum tempus occurrit regi. Either party expressly named upon the record may speak for the king; therefore, one may demur generally to his own pleading. Campbell: 2: cases. Or the court may sua sponte speak or act, or the amicus curiae may speak, and on collateral attack the king's matters, the mandatory requirements of a constitutionalism (§§ 56-60, Gr. & Rud.), may be raised by any party in interest. It is from this viewpoint that the significance of the general demurrer should be considered, also the motion in arrest of judgment, also objections upon collateral attack. At these three stages the king's matters may be renewed, or first raised. The coram judge proceeding concludes no one. See JURISDICTION; JUDGMENT; CODES; COLLATERAL ATTACK; Consensus.

Parties named on a record cannot, by their consent or acquiescence or compacts, affect the interests of the king. Public policy forbids this. Salus populi suprema lex; Id quod nostrum; In pari; Res inter alios acta; Jus publicum; Pacta conventa. There is a limit of waiver, and that limit is where public policy begins. There may be waiver and liberal construction, but these must not be carried into the domain of the mandatory requirements of a constitutionalism. Interest reipublice ut sit finis litium must be considered with the requirements of collateral attack. Concordare leges legibus est optimus interpretandi modus.

A reply will not aid a complaint. Houston, etc. R. R. v. Texas (1900), 177 U. S. 78; Devine. There are reasons, in removal of causes and other conserving principles of procedure, why a subsequent pleading cannot aid an antecedent. See Bliss, Pl. 437; Pom. Rem. 579; Johnson (1898), 12 Colo. Ap. 17.

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It is held that if an attorney appears in a case without authority, and, founded upon such assumption, a judgment is entered, this is not a void, but a voidable judgment only, and that merely laches will validate it. *Harshey*. But this reasoning is bad on principle. See *Debile*.

Jurisdictional facts must appear from the right record, from the mandatory record and not the statutory record.

See pp. 8-17, *Hughes' Proc.*; MANDATORY RECORD; *De non apparentibus*, etc.

A court must be authorized by its record to proceed. It cannot start upon nothing, or an insufficient record, and in the course of the proceedings carve out and set up a foundation for its proceedings, or authority for its action.

See LITERATURE; RECORD; GOVERNMENT; PLEADINGS; WAIVER; CONSTITUTIONALISM.

A somewhat strict application of this maxim is required for the integrity of constructive notice, appellate procedure, collateral attack, *Res adjudicata*, due process of law, the division of state power, and other conserving principles of procedure. For these it is necessary to apply the rule that a void beginning makes a void ending. *Beaumont*: 367.

In connection with the above there should be considered the old rule, which is also the code rule, that the statement shall contain a cause of action, which requirement is not waived by the filing of an answer. In effect, the code reads, that an insufficient statement is a fatal infirmity, as at common law. *Rushton*: 5; *Cruikshank*: 232. And as in equity. *Sto. Pl.* 10; *Harrison, sub Garland*: 60, cited, 195 U. S. 133; *De non apparentibus*, etc.

From the above are discoverable limitations of waiver, liberal construction of legislative power to interfere with necessary means of the judiciary. *Indianapolis*: 223.

A void judgment cannot be validated. *Christenson*, 17 Utah, 412, 70 Am. St. 794; *Gille*, 58 Kan. 118, 62 Am. St. 609, n.; *Campbell*: 2; *Horan*; *Dovaston*: 217.

Proceeding upon the assumption that the required record matter exists to authorize the action will not supply that record matter.

Crain v. U. S.; *Fish v. Cleland*: 12c; *Adams v. Gill*. *Expressio unius*, etc.; *Non obstante veredicto*. See RECORD.

The last rule is most important in constructive notice. §§ 83-123, Gr. & Rud.

Quod ab initio, etc., is a very important maxim in many relations, and particularly in procedure, as its citations will show. One of its most useful applications is expressed in *Sandborn*: 61 (jurisdiction must be given by a statement of the cause of action in the proper pleadings and proceedings). Consequently the rule is, that what was void in the begin-

Quod ab Initio.—

ning will continue so, unless amended; providing it is a matter that can be waived, and is waived. *Adams v. Gill*; *Crain v. U. S.*; *Munday*: 79; *Devine v. Los Angeles (U. S.)*.

Those who advocate variances, departures and extreme views as to the theory of the case and effects of waiver may be cited to oppose the application of *Quod ab initio*, etc., in many cases. See 1 *Wigm. Ev.* 15; *Ell. Ev.* 143, *Ell. App. Proc.* 917; 2 *Thomp. Tri.* 2310, 2311; *And. Steph. Pl.* 230, 2d ed.; *Hume*: cases.

In *Cumber*: 311 the answer was held bad, still a reply thereto was filed. But this did not operate to cure the defects in the bad plea. *S. P., Skeate*: 82. *Contra*: *Rensberger*. From the last aspect appear limitations of the law of waiver, and necessarily so for the support of the rule, that the general demurrer searches the essential pleadings and attaches to the first fault.

The maxim is derived from the civil law, where it is also expressed thus: *Quod initio vitiosum est, non potest tractu temporis convalescere*. Dig. 50, 17, 29. *Qua ab initio inutilis fuit institutio, ex post facto convalescere non potest*. Dig. 50, 17, 210.

Wherever a contract is void, either by a positive law, or upon principle of public policy, it is deemed incapable of ratification, confirmation. 1 *Sto. Eq.* 306. (*E. g.*, the contract of a married woman at common law, or illegal contracts.) *Beaumont*: 367.

A contract void in its conception for illegality, or absolute want of power, is incapable of ratification or confirmation. It must be made anew and upon a new and original consideration that it valid. *Quod ab initio*, etc., is applied both to procedure and to contracts. It should be considered in relation to waiver and that form of it mentioned under THEORY OF THE CASE. *Beaumont*: 367; *Cooke*: 321; *Skeate*: 82; *Cumber*: 311.

Where a lease is void for two reasons, and one of these is the non-payment of rent, acceptance of the rest will not waive the forfeiture upon the other ground. *Bro. Max.* 170. Acceptance of the rent under a void lease will not validate it. *Idem*.

If one posts a premature notice of discovery of a mine before its discovery, when discovery is afterward made it will not relate back and validate the location. See MINING CLAIM.

A conveyance to a fictitious person is void and will not support the claims of a bona fide purchaser. *Hyde v. Shine*, 199 U. S. 62.

Where a forbidden marriage exists, it may become validated by the cessation of the impediment. See MARRIAGE.

The following subject-matters if turned to will illustrate the application of *Quod ab initio* in relation thereto: *AIDER*; *APPELLATE PROCEDURE*; *Argumentum*; *CODES*; *COLLATERAL ATTACK*; *Concordare*; *CONSTITUTIONAL LAW*; *Debile*; *DEPARTURE*; *Frustra*; *INDICTMENTS*; *LACHES*; *Munday*: 79; cases; *Sache*.

QUOD CONSTAT CLARE, NON DEBET verificari: What is clearly apparent need not be proved. 10 *Mod.* 150; § 271, Gr. & Rud.; *Res ipsa loquitur*; *Manifesta probatione*; *Non potest adduci exceptio*, etc.; *In rebus manifestis*, etc.; *Probatum est*; *Presumptum est*; *Probatum est*. See JUDICIAL NOTICE. *De non apparentibus*, etc.; *Cum adsunt testimonia*, etc.; *Cothran v. Ellis*.

QUOD EST INCONVENIENS, AUT contra rationem non permissum est in lege: What is inconvenient or contrary to reason is not allowed in law. Co. Litt. 178; *Argumentum ab inconvenienti*; REASON. §13, Hughes' Proc.; §§ 46, 53, Gr. & Rud.

QUOD INITIO VITIOSUM EST, NON potest tractu temporis convalescere: Time cannot render valid an act void in its origin. Dig. 50, 17, 29; Bro. Max. 178; *Quod ab initio*, etc.; *Debile*, etc. Cited, § 105, Hughes' Proc.

QUOD LEX NON VETAT PERMITTIT: What the law does not prohibit it permits.

This maxim is allied in meaning to *Ubi jus*, etc. See Ashby: 273. There is no Sunday law or limitations of actions without a statute. §§ 33, 40, 163, 293, 294, Gr. & Rud.

One may commit suicide or attempt it in the absence of a law. The abutting owner on a street is not liable for damages caused by its being out of repair. Hay, 127 Wis. 1, 115 Am. St. 977.

One may build on his own land as high as he pleases, unless forbidden; or construct no fire escapes. See POLICE POWER; § 163, Gr. & Rud. CAUSE OF ACTION; CODES; ERROR; *Ignorantia*; INDICTMENTS; ISSUES; JUDGMENTS; JURISDICTION; MALICIOUS ACTS; *In jure*. The competency of parties to contract is a fluctuating element of that subject; also of illegal subject-matters; e. g., a common carrier may exchange or barter transportation for advertisements unless prohibited; the oral contract is valid unless prohibited by the Statute of Frauds.

QUOD NECESSARIA INTELLIGITUR id non deest: What is necessarily understood is not wanting. 1 Bulstr. 71. See IMPLICATIONS; McCulloch: 147. *Expressio eorum*, etc.

Quod subintelligitur non deest: What is understood is not wanting. 2 Ld. Raym. 832. See IMPLICATIONS.

Quod tacite intelligitur deesse non videtur: What is tacitly understood does not appear to be wanting. 4 Coke, 22. See IMPLICATIONS; *Expressio eorum*, etc.; McCulloch: 147.

QUOD REMEDIO DESTITUITUR IPSA re valet si culpa absit: What is without a remedy is by that very fact valid if there be no fault. Bro. Max. pp. 212-216; Taylor v. Cole, U. S. v. Holmes; Brown v. Sullivan; Bacon, Max. Reg. 9. Rights; remedies; *Ubi jus ibi remedium*: There is no wrong without a remedy. This maxim is the basis of the ideas in remittitur, retainer and self-defense.

QUOD VANUM ET INUTILE EST, LEX non requirit: The law does not require what is vain and useless. Co. Litt. 319. Vain and fruitless things. *Lex neminem cogit ad vana*.

QUOTIES IN VERBIS NULLA EST ambiguitas ibi nulla expositio contra verba fienda est: When there is no ambiguity in the words, then no exposition contrary to the words is to be made. Bro. Max. 618-623; Crooker; Harper: 218; Barnard: 108; Hauswirth: 51; Co. Litt. 147. When the intent and the words agree there is no room for construction. *Verba intentione*, etc.

Max. No. 21; §§ 223-236, Hughes' Proc.

QUO WARRANTO: P. v. Rensselaer, etc. R. R. (1836), 15 Wend. 113, 30 Am. Dec. 33-52, n.; 2 Dill. Corp. 888-905; 2 Beach, 1610-1621; High, Ex. Rem.; 2 Bailey, Jurisdic. 445-560; Brown, Jurisdic.; 2 Bouv. Dic. 809-811.

QUUM DE LUCRO DUORUM QUÆRATUR mellor est conditio possidentis: When the gain of one of two is in question, the condition of the possessor is the better. Dig. 50, 17, 126, 2. See POSSESSION; *In æquali*, etc.

RAEMEL v. LEHNDORFF (1904), 142 Cal. 681, 65 L. R. A. 88; cases, 100 Am. St. 154, n.; 69 L. R. A. 659.

Agency; malicious acts of agent; principal not liable. Hotel keeper not liable for malicious assault of waiter upon a guest. M'Manus; Little Miami R. R.; Calye's Case: 356, stated and discussed; Clancy, 71 Neb. 83, 115 Am. St. 559-568, n.

RAHBER, IN RE (1891), 140 U. S. 545; cases, 35 L. ed. 572. *Commerce; power of congress over; police power of the states; cases on.* Gibbons; Lelsey; Mugler; Barbier. See POLICE POWER. What is interstate commerce. C. v. Schollenberger (1893), 156 Pa. 201, 36 Am. St. 32, 22 L. R. A. 155. As related to importation of intoxicating liquor. S. ex rel. Cochran, 44 Kan. 723, 10 L. R. A. 616, n.; cases; Bartemeyer. See CONSTITUTIONAL LIMITATIONS.

RAILROADS: Duties of, as common carriers. Kansas City R. R.: 357; Coggs: 350. See BAILMENTS; CARRIERS; COMMON CARRIERS. *Necessity for regulating.* 35 Wis. 530.

Fencing depot grounds; construction. Salus; Necessitas; CONVENIENCE; REASON. Wilmot, 48 Or. 494, 7 L. R. A. (N. S.) 202-216, ext. n.

To run trains on time. Le Blanche; Denton. *To protect passengers.* Craker. *Crimes relating to.* McClain, C. L.

Tickets, contracts by. Cherry.

Generally: 2 Bouv. Dic. 83-819; And. Dic.

R. R. v. GREER: L. C. 283.

R. R. v. STEWART: L. C. 290a. Cited, § 12, Hughes' Proc.

RAILWAY CO.: See COMMON CARRIERS; Coggs: 350.

RAILWAY CO. v. LOCKWOOD: L. C. 352.

RANN v. HUGHES: L. C. 312.

RANSOM v. WILLIAMS: L. C. 122.

RAPE: Gordon v. S. (1893), 93 Ga. 531, 9 Am. Cr. R. 444-449, n. (what constitutes; capacity; presumptions); McClain, C. L. 438-454, 462-467 (assaults to commit).

Separate and distinct acts of intercourse; election. Batchelor v. S. (1900), 41 Tex. Cr. R. 501, 96 Am. St. 791, n. (joinder of felonies); Manning v. S. (1901), 43 Tex. Cr. R. 302, 96 Am. St. 873 (other acts to prove).

Generally: 2 Bouv. Dic. 821, 822, 3 Gr. Ev. 209-215, 2 Bish. Cr. Proc. 947-979; Payne v. S. (1899), 40 Tex. Cr. Rep. 202, 76 Am. St. 712 (sleeping or insensible woman).

RATIFICATION: Elements of. See

ELECTION; 2 Bouv. Dic. *Omnis ratihabitio*, etc.; RESCISSION; *Quod ab initio*, etc.; *Ultra vires*; 6 Cyc. 297-300.

Of contract induced by fraud. 1 Page, 139; Horn v. Cole; *Allegans*.

Ratihabitio mandato equiparatur: Ratification is equal to a command. Dig. 46, 3, 12, 4; Bro. Max. 867, Story, Ag. 302; *Omnis ratihabitio*, etc. § 310, Hughes' Proc.

Void pleadings cannot be ratified. §§ 225, 228, 230, Gr. & Rud.

Principal's, of agent's loan. Thompson, 60 W. Va. 42, 6 L. R. A. (N. S.) 311, n.

RATIO EST FORMALIS CAUSA CON- suetudinis: Reason is the source and mould of custom. See REASON; *Cessante ratione*, etc. *Ratio est legis anima, mutata legis ratione mutatur et lex:* Reason is the soul of the law: the reason of the

Ratio Est Formalis.—

law being changed, the law is also changed. 7 Coke, 7; *Cessante*, etc.; *Quod est inconveniens*, etc. *Ratio est radius divini luminis*: Reason is a ray of divine light. Co. Litt. 232. Cited, § 13, Hughes' Proc.; §§ 31, 46, 54, Gr. & Rud.

Ratio et auctoritas duo clarissima mundi lumina: Reason and authority are the two brightest lights in the world. 4th Inst. 320. See REASON; *Quod est inconveniens*. *Ratio legis est anima legis*: The reason of law is the soul of the law. See REASON; *Cessante*, etc.

RAY v. F. (1882), 6 Colo. 231. Plea upon the mandatory record in a criminal case essential. Crain v. U. S.

The rationale is identically the same in civil cases. Munday: 79. Cf. Colorado Cases: Allenspach; Berdell; Hume: cases. The plea upon the right record is essential for jurisdiction; for the *coram iudice* proceeding.

RAYMOND v. JOHNSON: L.C. 39.

READHEAD v. E. E.: sub Ingalls: 353.

REAL ACTIONS: 2 Gr. Ev. 547-559.

See EJECTMENT.

REAL ESTATE: Maxims: Leading Cases.

Quicquid plantatur solo solo cedit: Kinhead v. U. S.; *Elwes v. Maw*; *FIXTURES*; *Cujus est solum ejus est usque ad coelum*; *Bright v. Boyd*; *Goddard v. Winchell*; *Guille v. Swan*.

Sic utere tuo ut alienum non laedas. *Indemaur v. Dames*; *Fletcher v. Rylands*: cases; *Heaven v. Pender*; *Fent v. Toledo R. R.*; *St. Helen's Smelting Co. v. Tipping*: cases; *Scott v. Shepherd*; *Hill v. Boston*; *White v. County of Bond*; *Dovaston v. Payne*: 217 (highways); *Garth v. Cotton* (waste); *Crosby v. Wadsworth* (emblemments). *Pinnington v. Gal-land* (ways of necessity).

Domus sua cuique est tutissimum refugium: *Semayne's Case* (right to break doors to serve process); *Campbell v. Race* (right to break and enter the close). See cases under NUISANCE; TORTS; TRESPASS; SELF DEFENSE; *Necessitas inducit privilegium*, etc.; LANDLORD AND TENANT.

Contracts involve. See DEEDS; TRUSTS; MERGER.

Possession of land, presumptions from. See ADVERSE POSSESSION; LIMITATIONS; FRAUDS AND PERJURIES; *Williamson v. Brown*; *Lester*: 341; *Beil v. Twilight*; *Le Neve*: 396.

Priorities; *registration of deeds*. *Moss*; *Keech v. Hall*; *Le Neve*; *Qui prior est tempore*, etc.

Improvements; betterments; right to compensation for. *Bright*. See *Jewett v. Dringer*.

Entry on premises generally actionable. *Williams v. Esling*. See *Semayne's Case*. *Adjoining owners*. 1 Cyc. 766-793.

Dangerous premises causing damage to third persons; when landlord liable for. *Todd v. Flight*; *Sic utere*, etc.

Negligent construction of improvements. *Fletcher v. Rylands*; *Rochester White Lead Co. v. Rochester*, sub *Hill v. Boston*.

Estates by the entireties. See ENTIRE ESTATES.

Statute of frauds: contracts relating to real estate affected by. See FRAUDS AND PERJURIES; *Wain*: 335.

Conditions in deeds: leases. *Dumpor*. *Covenants in deeds: leases*. *Spencer's Case*. *Leases, observations on*. § 144, Hughes, Conts. See LANDLORD AND TENANT.

Deeds; form of. § 146, Hughes, Conts. *Infants; deeds of, generally void*. *Craig*.

Owner's right to enter and dispossess occu-

Real Estate.—

pant and take possession; how far and when he may employ force. *Taylor v. Cole*; *Harvey v. Brydges*.

Vendor and purchaser. See *Warvelle on*; *Devlin on Deeds*. *VENDOR'S LIEN*.

REAL PARTY IN INTEREST: Is jurisdictional. See PARTIES. *Fabula*, etc. *Williams*: 93; *Cole v. Silver*; *Bliss*, Pl. 45, n. See PARTIES.

REAL PROPERTY: 2 Bouv. Dic. 827.

REASON: Is the soul of the law; and when the reason of any particular law ceases, so does the law itself. §§ 46, 54, Gr. & Rud.; *Pari ratione*, etc.; *Bro. Max.* 159-163; § 149, Hughes, Conts. See *Katz Case*, sub *WATER*. See also INTERPRETATION; *Cessante ratione*, etc., with *Expressio unius*, etc.; *Expressio eorum*, etc.; *Certum est quod*, etc.; *Malus*; *Ratio*. This is one of the great maxims of the law. *Verba nihil operant*, etc.; *Verba of-fendi*, etc.; *Scire proprie est rem ratione*, etc.; *Lex est ratio summa*, etc.; *Nihil quod est contra rationem est licitum*; *Argumentum ad inconvenienti*, etc.; *Quod est inconveniens*, etc. *Bouv. Dic.* (Maxims). § 287, Hughes' Proc.

Words: how construed. See *Verba*, etc.

REASONABLE DOUBT: 7 Am. Cr. R. 436-438 (defined). What is. *Billard*: 189; §§ 272, 294, Gr. & Rud.; *Bonnell*: 185. See PREPONDERANCE OF TESTIMONY; BURDEN OF PROOF; *C. v. McKie*: 187; 12 Cyc. 622-627; *Bonnell*: 185; *Smith v. S.* (1901), 133 Ala. 145, 91 Am. St. 21, n.; *McClain, C. L.*; *S. v. Gallivan* (1902), 75 Conn. 326, 96 Am. St. 203, n. *Venue need not be proved beyond a reasonable doubt*. *Billard*: 189.

REBUTAL EVIDENCE: 1 Gr. Ev. 74, n.; 1 Wh. Ev. 571; *Kohler* (1864), 26 Cal. 606.

Extent of, is discretionary. *Fitzpatrick v. U. S.* (1900), 178 U. S. 304; *Wells, Quest. Law and Fact*, 692. See DISCRETION.

RECAPTION: 2 Bouv. Dic. 830.

RECDITUR A PLACITIS JURIS, *Potius quam injuria et delicta maneat impunita*: Positive rules of law will be receded from rather than crimes and wrongs should remain unpunished. *Bacon, Max. Reg.* 12; *Bro. Max.* 10. (This applies only to such maxims as are called *placita juris*; these will be dispensed with rather than crimes should go unpunished. *Quia salus populi suprema lex*, because the public safety is the supreme law). *Salus populi*, etc.; *Legibus sumptis*, etc.

RECEIPT: May be contradicted by oral evidence. *Tobey*; *Cumber*: 311; 1 Gr. Ev. 212, 305, 2 *id.* 516, 2 *Whart. Ev.* 1063, 1364, *Bish. Stat. Crimes*, 341; *De Arnaud*, 151 U. S. 483; *Baker*, 19 How. 126, 15 L. ed. 528, n.; *Bigl. Estop.* 471. Effect of receipt in full. 103 Am. St. See ORAL EVIDENCE. *Deeds; receipts in, may be contradicted as to amount*. *Jackson v. Cleveland*. Generally: 2 Bouv. 832-834; *And. Dic.*

RECEIVER: Duty to protect prior liens. *American Bank*, 152 Ind. 582, 71 Am. St. 345-384, ext. n.

Suit against, without leave. *Malott*, 153 Ind. 35, 74 Am. St. 278-300. Effect of judgment against. *Painter*, 138 Cal. 231, 94 Am. St. 47. General powers; rights and duties of. *Harrigan*, sub *MAGNA*; 2 Bouv. 834-841; *And. Dic.*; § 53: CONVENIENCE, Gr. & Rud.

Receivers' certificates. 2 Bouv. Dic. 842-844.

For a corporation, may be appointed when. *Hall v. Nieuwkirk*, 12 Idaho, 33, 118 Am. St. 189-207, ext. n.

Receiver.—

Liability for tort. Shedd, 230 Ill. 118, 120 Am. St. 269-282, n.

RECEIVING STOLEN GOODS: 2 Blish. Proc. 979-991; Bouv. Dic.; McClain, C. L. 713-727.

RECENT POSSESSION OF THE fruits of crime. Bouv. Dic.; R. v. Partidge, 190; McClain: 618-620.

RECITAL: Recital in records; how far conclusive; Ferguson: 264. Pleadings must not be by way of recital. Bliss, Fl. 318. See *Res adjudicata*. Recklessness, causing death. R. v. Longbottom; R. v. Lowe; McClain, C. L. 325. Generally: 2 Bouv. Dic. 845, 846.

RECOGNIZANCE: 2 Bouv. 847; And. Dic.

RECONVENTION: McLeod v. Bertschy. SET-OFF; RECOUPMENT. Allowed for damages on attachment bond in same suit. 68 Am. St. Rep. 266. And likewise on injunction bond to avoid a multiplicity of suits. *Sub* Trepanil.

RECORD: See MANDATORY; DUE PROCESS OF LAW RECORD; BILL OF EXCEPTIONS (Statutory Record).

May be impeached for fraud. § 70, Gr. & Rud. Is to limit and define. §§ 59-60, 88, 94, 208, Gr. & Rud. Procedure depends on. §§ 88, 96, 140, 208, Gr. & Rud. Codes require. §§ 135, 137-140, 147, Gr. & Rud.

A memorial of what was done. And. Dic. 849-851; 1 Gr. Ev. 275; Freem. Judgm. 37, 76-78. *Quod per recordum*, etc.; Montgomery: 47. § 20, Hughes' Proc.

The record rule: "What ought to be of record must be proved by record, and by the right record," is enumerated as the fourteenth conserving principle of procedure or of protection. See p. 14, Hughes' Proc. What is there observed should be read in this connection. Iverslie: 46.

See ORAL EVIDENCE; ESTOPPEL; Leading Cases, 1-84; 219-232; PLEADINGS; PROCEDURE; EQUITY; LITERATURE; MAXIMS: *Expressio unius*, etc. §§ 1-12, Hughes' Proc.

Recorda sunt vestigia vetustatis et veritatis: Records are vestiges of antiquity and truth. 2 Rolle, 296. The mandatory record existed earlier than A. D. 1215. See § 15, Hughes' Proc.

In a constitutionalism a record must exist. In a government of protection, official action cannot be exercised without a record. The theory and the requirement for it underlie all governmental action, and it is most strictly required for the exercise of all judicial action, exactly alike and for identical reasons. From necessity arrests may be made in some cases without a record or warrant, but as a rule, an arrest must be justified upon a record. Justification defenses by officers depend upon a sufficient record.

§§ 27, 79, 80, 90-103, 229, 239, Hughes' Proc. See JUSTIFICATION; Savacool: 164; Tarble's Case: 247.

A court derives its authority to adjudicate a matter or to bind a person from its records. *Cruikshank*: 232; *Munday*: 79; see ALLEGATIONS; ISSUES; *Res adjudicata*;

Record.—

EVIDENCE. §§ 39, 45, 50, 80, 245, Hughes' Proc.

In a constitutionalism a court must be bound by its record. See CONSTITUTIONALISM; JURISDICTION; USURPATION; *Munday*: 79; *Cujus est instituere*, etc.; ADMISSIONS; DENIALS; *Dickson*: 34; cases.

Upon the mandatory record depends the guaranty of due process of law, which must be rightly evinced, else it is presumed not to exist. *De non apparentibus*, etc. Its requirements cannot be waived nor presumed; they must affirmatively appear. See JUDICIAL NOTICE; *Omnia presumuntur rite*, etc.

An authority must be pleaded. *Hopper*: 4; *Rushton*: 5; cases. Every interference with life, liberty or property must be authorized by a record to justify those exercising their authority and jurisdiction. For justification defenses, records are prescribed. And to this requirement appears the above record rule, also the maxim *Expressio unius*, etc.

A record is indispensable to evince the *Coram judice* proceeding. This is essential for *Res adjudicata* defenses. Other conserving principles also require it.

See pp. 8-32; §§ 1-2, Hughes' Proc.; *Coram judice*; JURISDICTION; PLEADINGS; *Res adjudicata*; LITERATURE. §§ 27, 79, 80, 90-103, 229, 239, Hughes' Proc.

The mandatory record is the warrant of certainty, and is the measure of authority or jurisdiction. §§ 39, 45, 50, 80, 245, Hughes' Proc.

Drake, Attach. 86, 87; *Munday*: 79; *Cruikshank*: 232; cases. Every necessary fact must appear therein. *Arrano v. P.* (1897), 24 Colo. 283. It is the warrant of authority to enter a sentence. *Windsor*: 1; 1 Blish. Cr. Proc. 1347.

It is conclusive and irrefragable. *Mondel*: 77; *Fayerweather*, sub *RES ADJUDICATA*; *Best*, Ev.; *Starbuck*.

The whole public is interested in judicial records. *Caveat emptor*; CONSTRUCTIVE NOTICE; *Lis pendens*; *Windsor*: 1; notes to *Lampleigh*: 301.

Record matter essential for the foundation of judgments and of all condemnation proceedings. See INTRODUCTION; §§ 1-12, Hughes' Proc.

A record must exist and set forth the facts that one was in deliction, else a court acquires no jurisdiction, and consequently can make no order *inter partes*, nor take any step or proceeding, nor hear any testimony, nor enter a final judgment, nor establish any sentence that will support a plea of *res adjudicata*. The latter defense—estoppel of record—depends on record matter made in a *coram judice* proceeding.

Consent will not confer jurisdiction of subject-matter, otherwise parties could agree—contract—that one of them had committed an actionable wrong, and consequently jurisdiction of a myth—moot case—would be sought. But this cannot be. *Fabula non judicium*; *S. v. Baughman*: 268. Consequently, records must exist, and present a *bona fide* subject-

Record.—

matter, and evince judicial treatment of that matter in accordance with fundamental principles. Windsor: 1; Oakley: 222; and Dimes: 176.

There must be a record defining a deliction and the one in the wrong (this is the cause of action); also of what was done with it. And. Dic. 863; also *id.* Roll, 910; Montgomery.

Essential for protection, and to impart notice at execution, judicial and tax sales. Technicalities of the law are established by the record to operate as safeguards. Sperry v. C., *sub* Munday: 79; Windsor: 1; Stubbings: 49. How construed. §§ 24, 27, Hughes' Proc.

The safeguards of the law are its forms. Windsor: 1.

The placitum—the return of the indictment or allegations into court, together with such, and the issues, the orders setting the cause and other record entries, the disposition of the issues and various steps, and the judgment or sentence, constitute the *mandatory record*. If a felony, the presence of the prisoner must be shown by it. Sperry v. C. See Rouse v. Donovan, *sub* Windsor: 1; MANDATORY RECORD. §§ 24, 27, Hughes' Proc.

Technical safeguards of. See PLACITUM; CAPTION; Montgomery: 47.

Records; when subject of larceny. McClain, C. L. 543. Forgery of, *id.* 750; destruction of, *id.* 920; C. v. Kane: 183.

RECORDA SUNT VESTIGIA: See RECORD.

RECORD RULE: See §§ 56, 104, 124, Gr. & Rud.

RECORDS: Mandatory and Statutory defined. See p. 15, Hughes' Proc.

RECOUPMENT: See COUNTERCLAIM; Waterman on Setoff; Bliss, Pl. 370; note, 73 Am. St. 618; 2 Bouv. 851-853; And. Dic. § 139, Hughes' Proc.

Judgment for excess permissible. Britton v. Turner (dictum); Johnson, 68 N. H. 487, 73 Am. St. 610, n.

Independent suit may be brought for. Shoemaker; Kirven; Wat. Setoff, 173; Mondel: 77.

Whatever arises out of a transaction should be settled in one juridical determination of the matter. Hahl v. Sugo; Perez: 26. Equity attaching for one purpose attaches for all. *Interest reipublice ut sit finis litium* is a principle of public policy. *Salus*.

Accordingly it has been held that damages to the person and to property may be joined. Emerson v. Nash; King v. Chicago R. R.

Agreeably to the foregoing the widest scope should be given counter-claim, set-off and recoupment. However, as to this the courts are widely apart and often absurdly so, *e. g.*, if one in repelling an assailant makes more than self defense and beyond this an excessive assault, this cannot be recouped by his assailant when sued for beginning the fight, in other words, he who began the fight must answer in one action, while he who made the row more than it should have been must respond in a separate suit. Burdick, Torts, 271; Dole, 35 N. H. 503; Dooling, 35 Ohio St. 58. *Contra:* Gutzman, 114 Wis. 589, 58 L. R. A. 744; Stone, 2 Metc. (Ky.) 339.

Pleading of, admits plaintiff's contract. Wat. Setoff, 562; Ansley.

RECOVERY AT LAW ENDS LITIGATION: Marriot. See Mondel: 77. Essential parties requisite. Williams: 93.

RECTIFICATION: Not granted to affect *bona fide* purchasers. Whart. Conts. 211.

Of contracts. Whart. Conts. 205-211.

RECURRENDUM EST AD EXTRAORDINARIUM QUANDO NON VALET ORDINARIUM: We must have recourse to what is extraordinary when what is ordinary fails. *Legibus sumptis; Lex non eracte.*

REDDENDA SINGULA SINGULIS: Let each be put in its proper place; that is, that the words should be taken distributively. Suth. Stat. 282. Giving each to each. C. v. Jordan, 18 Pick. 228. *Verba generalia.* Smith, Conts. 547. § 269, Hughes' Proc.

RE-DIRECT EXAMINATION OF WITNESSES: 1 Gr. Ev. 467; 8 Encyc. Pl. & Pr. 123-128.

REDUNDANT MATTER: See PROLIXITY; SURPLUSAGE; *Utile per inutile.*

REEDIE v. R. E., *sub* Hilliard.

REES v. BERRINGTON: L. C. 334a.

REFERENCE FROM ONE COUNT TO another. R. v. Waters: 71; *Verba relata hoc maxime.*

For trial; compulsory when. Steck, 142 N. Y. 236, 25 L. R. A. 67-69, ext. n.; Grim, 19 Cal. 140, 79 Am. Dec. 206-211, ext. n.; Andrus, 73 Wis. 642, 3 L. R. A. 271, n.

Referee may allow an amendment of a sheriff's return. Camp v. Bank, *sub* PLEADING, Hughes' Proc., 103 Am. St. 173.

REFORMATION OF DOCUMENTS: Watch Min. Co. v. Crescent Min. Co. (1893), 148 U. S. 293, 37 L. ed. 454, n.; Green v. Stone (1896), 54 N. J. Eq. 387, 55 Am. St. 577, n.; Crookston Imp. Co. v. Marshall (1894), 57 Minn. 333, 47 Am. St. 612, n., 2 Pom. Eq. 857-871, 3 *id.* 1375-1415, 1 Sto. Eq. 110-183, 2 Page, 1237-1254. See RESCISSION; MISTAKE.

Of sheriff's deed. Stewart, 141 Ala. 405, 109 Am. St. 33-40, ext. n.; CANCELLATION; Williams v. Hamilton (1898), 104 Ia. 623, 65 Am. St. 475-522, ext. n.; 2 Beach, Conts. 850-877; 22 Rul. Cas. 812-904 (rectification; cancellation); 2 Warv. Vend. 778-806.

REPRESENTING MEMORY: Rules of. 1 Gr. Ev. 436-439; 1 Wh. Ev. 516-526; 2 Tay. Ev. 1266-1268; 8 Encyc. Pl. & Pr. 135-141. *S. v. Bacon*, 41 Vt. 526, 98 Am. Dec. 616-623, ext. n. (memoranda to be used). Only contemporaneous memoranda can be used. 1 Gr. Ev. 438; Putnam, 162 U. S. 687; 15 Am. Dec. 194-198, n.

REGINA CASES: Post. See Rex; R. CASES. R. stands for Rex or Regina (King or Queen); C. stands for Commonwealth; P. for People; S. for State; U. S. for United States.

REGNAL YEARS: A table of, to facilitate computing of dates. 2 Bouv. Dic. 862.

REGRATING, FORESTALLING AND engrossing. Eddy. Combinations, 36-70.

REGULAE GENERALES: Rules formulated by courts to regulate procedure before them. See English Judicature Act, *sub* EQUITY, Hughes' Proc.

REGULA PRO LEGE, SI DEFICIAT lex: In default of the law, the maxim rules. Maxims supply the law. *Si aliquid; Ubi non est directia; Maxime ita dicta.* See EQUITY; MAXIMS; Bonus *judex*.

See Preface, also §§ 3, 14, 31, 33, 43, 74, 77, 78, 82, 118, 125, 134, 135-136, 142, 150, 211, 263, 265, 266, 267, 268, 297, Gr. & Rud.

Regula Pro Lege.—

"The Roman still holds dominion over this world by the silent empire of his law."

See CODES; COLLATERAL ATTACK, CIVIL LAW. Whether or not our law is Roman, or whether the Civil Law is adopted in shreds and patches is of much consequence to the student. This was a leading question of the Renaissance. If it is the acorn, the root and the heartwood it should be taught as such. The fountain should be well understood. *Melius est petere fontes quam sectari rivulos.*

When the law was defective the Roman appealed to the Emperor. Now, when it is defective we supply the defect with the maxim; the maxim rules; it is the unwritten law; it is the prescriptive constitution. Illustrations of these propositions are found in *Oakley v. Aspinwall* (N. Y.): 222; *Langabier* (Ill.): 174a; *S. ex rel. Henson v. Sheppard* (Mo.); *Church v. U. S.* In connection with these cases others will be found. See PRESCRIPTIVE CONSTITUTION; *Lex non exacte.*

"The fundamental maxim of a free government seems to require that the rights of personal liberty and private property should be held sacred." *Wilkinson v. Lealand*, 2 Pet. 627, 657 (Story, J.); *stated, McQuillin, Munic. Ord.* 495; *Crabbe, History of the Law*, 3.

The Civil Law supplies all defects of legislation. In Germany judicial officers are sworn to uphold the laws of the empire and in case of defects thereof, then according to the Civil Law. § 77, Gr. & Rud. *Lex non exacte.*

REGULARITER NON VALET FACTUM de re mea non alienanda: Regularly a contract not to alienate my property is not binding. Co. Litt. 223. Contracts against alienation are void. See ASSIGNMENTS.

REGULARITY: Presumptions of. See *Omnia presumuntur rite*; EVERY; *Cooper v. Reynolds*. § 85, Hughes' Proc. Will not supply omitted allegations. § 134, Gr. & Rud.; *Harrow*; *Hahn*.

REGULAR PROCESS: What is. *Savacool*: 164. *Necessitas inducit privilegium.*

REHEARINGS: 2 Bouv. Dic. 863, 1 Bish. Crim. Proc. 1263-1271. Court may order of its own motion. *Wachendorf*, 61 Ia. 509. By Supreme Court of U. S. A settled decision cannot be re-examined by it. See APPELLATE PROCEDURE.

An original question cannot be raised for the first time on rehearing. *Lamar Co.*, 26 Colo. 370, 77 Am. St. 261, n. (on principle, the ground for a general demurrer, and grave constitutional and jurisdictional questions may be raised at any time); *Clipper*, 29 Colo. 377, 93 Am. St. 89.

RELATIO EST FICTIO JURIS ET INTENTIO AD UNUM: Relation is a fiction of law, and intended for one thing. 3 Coke, 28. See *In fictione*, etc. *Relation*, doctrine of. *Jackson v. Ramsey* (1824), 3 Cow. 75, 15 Am. Dec. 242-255, ext. n. *Cooper v. Chittly*.

Relation never defeats collateral acts. 18 Viner, Abr. 292. *Relation shall never make good a void grant or devise of the party.* 18 Viner, Abr. 292.

RELEASE: 2 Bouv. Dic.; *Ans. Conts.* 314; 1 Beach, *Conts.* 456-501. *Of claim for injury.* M., K. & T. R. R., 98 Tex.

Release.—

47, 107 Am. St. 607-620. *Under seal*; effect. *Ellis*: 389.

Of one of several trespassers releases all, and extinguishes the cause of action. Trespasser paying damages can take no assignment against others. *Tanner*, 34 Mont. 121, 115 Am. St. 529; *Allen v. Ruland*, 79 Conn. 405, 118 Am. St. 146.

RELEVANCY OF EVIDENCE: 1 Gr. Ev. 51-74; 2 Best, Ev. 252 (rule well stated); 1 Ell. Ev. 143-193. See *HEARSAY*; *Res inter alios*; 16 Cyc. 1010-1144. Cited, §§ 335-341, Hughes' Proc.; §§ 272, 278, Gr. & Rud.

MAXIMS: *Frustra probatur quod probatum non relevat*; *Quod ab initio*; *De non apparentibus*.

LEADING CASES: *Bristow*: 135; *Perry*: 136a; *Borkenhagen*: 81; *Fish*: 12c; *U. S. v. Cruikshank*: 232; *Shutte*: 291.

Depends on allegation, also the admission or the denial and the issue. *Frustra*; *Dickson*: 34; *Munday*: 79.

Mitigation of damages; *liberal rule*. See *MITIGATION*; *Damnum absque*.

Allegata et probata must correspond. *Bristow*: 135; cases; *Perry*: 136a.

Material allegations essential for the relevancy of evidence. It is vain and fruitless to prove without allegations. *Adams v. Gill*; *Moore v. C.*: 21; *Van Leuven*: 14; *U. S. v. Cruikshank*: 232; *Borkenhagen*: 81; *Mallinckrodt*: 12a; *Fish*: 12c; *Saunderson* (Wis.). See ALLEGATIONS.

Frustra probatur quod probatum non relevat. *Saunderson* (Wis.); *Borkenhagen*: 81; *Wisconsin Co.*; *Shutte*: 291; *Harrigan*, sub *MAGNA CHARTA*; see CODES; PROCEDURE.

Immaterial evidence need not be objected to nor excepted to. Of course a general objection will avail. *Shutte*: 291. *Quod ab initio.* Irrelevant evidence, if admitted, can not be made relevant so as to prevent one's right to objection and exception. This involves an important rule. *Quod ab initio*; *Fish*: 12c.

Issues essential for authority to summon, produce and to receive evidence. *Dickson*: 34; *Munday*: 79. See DENIALS; ISSUES; IDENTIFICATION; CAUSE OF ACTION; *Quis, quid, coram quo*; *Citatio*; *Citationes*; JURISDICTION.

The relevancy of evidence involves questions related to the nature and the character of government; and such as whether or not it is accusatory or inquisitorial or barbarous. *Hale v. Henkel*. See PROCEDURE. *Frustra probatur* is an important rule of the prescriptive constitution. See *Allegata et probata*; *Res inter alios acta* (hearsay evidence).

Probata will not supply allegata. See CAUSE OF ACTION; ALLEGATIONS; *Quod ab initio*.

RELIEF: May be in the alternative. See *Merwin's Eq.* 724-725; *Russell v. Shurtleff*; *White*: 130. See PRAYER; *Ad damnum*.

RELIGION: 2 Bouv. Dic. 866. See CHRISTIANITY. §§ 13, 14, Hughes' Proc.; §§ 46, 52, Gr. & Rud. *Religious belief*, no excuse for crime. *McClain*, C. L. 120, n. *Actus non facit reum*, etc. *Religious meetings*, disturbances of. *S. v. Linkhaw*.

REMAINDER: Bouv.: 4 Kent, 206-207, n.

REMEDIAL STATUTES: How construed. *Heydon's Case*; *Lonstorf*; *Terre Haute R. R. v. Indiana*; *Ellis v. U. S.* *Boni judicis*, etc.; *Steger v. T. Co.* (cura-

Remedial Statutes.—

tive statute). See **STATUTE**; **TAXATION**: cases.

REMEDIES FOR RIGHTS are never favorably extended. 18 Viner, Abr. 521. *Boni iudicis*, etc.; Ashby: 273; *Ubi jus*.

REMEDIES ought to be reciprocal Cooke: 321.

REMEDY: 2 Bouv. Dic. *Legibus sumptis*; 1 Cyc. 700-757; *Supervacuum*, etc.

Is for wronged persons only. See **PARTIES**; *Fabula*, etc. Constitutions create courts to afford remedies. § 27a, Hughes, Conts. Duty of government to provide. Marbury: 142; *Legibus sumptis*. Preambles, by implication, call for. Marbury: 142.

Right of citizens to, is paramount. Dash: 237a; § 62, Gr. & Rud. Some known and established remedy attaches to every right. Windsor; Ashby: 273.

Equity suffers not a wrong without a right. See **MAXIMS OF EQUITY**. Equities; statutes may give a remedy for. Cool. Const. Lim. 442, 464, 6th ed.; Hitchcock v. Galveston.

Where there is no wrong described or stated, there is no jurisdiction. See Rush-ton: 5; Munday: 79; notes to Lampleigh: 301. *Fabula*, etc. See **SUBJECT-MATTER**; *Res adjudicata*. Crime must be defined. 12 Cyc. 139-147.

Must accord with the record. McLaughlin: 31; Iverslie: 46. And a party wronged must be described. Sto. Pl. 259. See **PARTIES**; *Fabula*, etc.

Allegations, admissions and denials—Issues are the measure of. § 5, Hughes, Conts.; 180 U. S. 28, 471, 533; see *Res adjudicata*; Thomas v. Board; Kolz, 200 U. S. 76.

Courts should give a remedy according to the facts. McLaughlin: 31. And according to the record, the law and the evidence. Reddell, in Dimick Case, sub Iverslie: 46; McAfee. Joinder of causes from same tort. Emerson; King v. Chicago R. R.

REMITTITUR: Of damages may be entered in the appellate court. Baker, 62 Wis. 615; Russell v. Place: 27. See *Ad damnum*; Davis Co., 31 Colo. 82: cases.

REMOTENESS: *In jure non remota*, etc. See **PRIVITY**; **PROXIMATE CAUSE**; Hendrick: 319; Scott (Squib Case); Vicars; Victorian Com'rs; Gilson v. Delaware Co. Cited, §§ 9, 128-132, Hughes, Conts. §§ 67, 68, Gr. & Rud.

Cause of death, when too remote. R. v. Pym. Intent; one violating law, who is shot at but is missed and a bystander killed, is not liable for his death. C. v. Moore.

REMOVAL OF CAUSE: The means of removing a cause are requirements of procedure; therefore, the removal of causes has been enumerated as one of the conserving principles of procedure. § 97, Gr. & Rud. See Hughes' Proc.

The principal provisions relating to, are the Acts of 1887 and 1888, quoted Hughes' Proc. See Black, Dillon, Desty, also § 641, R. S. U. S.; Strauder; Kentucky v. Powers.

The right to removal depends upon facts properly appearing upon the record. See **FEDERAL PROCEDURE**. For the right, for this part of the supreme law of the land, pleadings and the record must exist.

The application divests the state court of jurisdiction, which cannot be re-vested. Harkness: 152: cases.

Time of the application to remove is the first opportunity that application could be made at any time before final trial. Whitcomb v. Smithson (1900), 175 U. S. 635; Mattoon v. Reynolds (1894), 82 Fed. 417; K. C. R. R. v. Herman (1902), 187 U. S.

Removal of Cause.—

63 (fraudulently joining a party to cut off the right is unavailing if the plaintiff's proceedings disclose that fact at any time before final trial); Yulee v. Vose (1878), 99 U. S. 539 (right to elect attaches when the plaintiff first discloses the grounds for); Dow v. Bradstreet Co. (1891), 46 Fed. 824 (separable controversy; sham party); Arapahoe Co. v. R. R., 4 Dill. 277 (devises without right reason or just cause cannot be employed to deprive one of his lawful rights); Kern v. Huidekoper. Forms for. 2 Fost. Fed. Prac. 1319.

RENAISSANCE OF THE CIVIL LAW: § 72, Gr. & Rud.

RENSBERGER v. BRITTON (1903), 31 Colo. 77-79 (first case), 79-82 (second case).

Cited, §§ 13, 15, 45, 83, 122, Hughes' Proc.; §§ 115, 151, 158, 177, 199, 237, Gr. & Rud. See Breeze; Hume; Moynahan; Russell v. Shurtleff; Jansen, 8 Colo. Ap. 40; Holman, id. 285-286. These are extendedly noticed in Hughes' Proc., where they are offered to show very inconsistent views. Here it is only observed that where the grounds and rudiments of law are unknown, almost anything is made plausible and acceptable.

RENUNCIATION: 2 Bouv. Dic. 878. Of contract, before performance. Frost: 308a; Hochster: 308b; Ans. Conts. 280-284.

REOPENING A CASE: 2 Bouv. Dic. 878. See **REBUTTAL**. After arguments, in capital case, further evidence may be admitted. Wells, Quest. Law, 692; Bonnell: 185.

REPEAL: Of statute, by implication. 2 Bouv. Dic. 882. McClain, C. L. 91-95. University, 20 Utah, 457, 77 Am. St. 928; Petrie (1905), 199 U. S. 487; 8 Cyc. 373-377 (common law), 747-751; 63 Kan. 793, 88 Am. St. 267-297, ext. n.; Suth. Stat. 136-169. *Leges posteriores*; 95 Minn. 153, 111 Am. St. 448-462, ext. n.; Dash: 237a.

The repeal of a penal statute abrogates all proceedings founded thereon. All rights founded thereon before judgment are obliterated. Ball, 135 Cal. 375, 87 Am. St. 110, n.

Remedies given by statute fall with its repeal, and at any time before final judgment. A statutory cause of action is not a perfect and a vested right before final judgment. Vance v. Rankin (1902), 104 Ill. 625, 88 Am. St. 173, n.

Repeal of law. For change of law as affecting appeals. Cassard, 52 La. Ann. 835, 49 L. R. A. 272, n. Vested rights in statute of limitations. Terry: 240; 49 L. R. A. 272, n.

REPETITION: See **SURPLUSAGE**; Sturges: 111; Green: 90.

REFLEADER: When ordered. See Hitchcock: 12; Garland: 60; 2 Bouv. Dic. 884. Where pleadings are waived there should be no replader.

REFLEVIN: 2 Bouv. 884-885; And. Dic. Damages caused by unlawful seizure of property. See Trapnall. Property custodia legis; when it may be replevied. Freeman: 287; Buck: cited, Cobby, Replevin. Possession sufficient against a wrongdoer. Armory: 180.

Trespasser cannot plead the benefits of his trespass. Bull. Contracts; liabilities are not enforced where they arise from a claimant's own wrong. Nullus commodum. Specific delivery of chattels. Cookson; W. & T. L. Eq. Cas.; Pusey: 276.

Demand not necessary when property is taken tortiously. Wells, Replev., § 372;

Replevin.—

Breitenwischer, 11 Mich. 6, 66 Am. St. 373, n.; Galvin, 11 Me. 28, 25 Am. Dec. 258; Sargent, 25 Cal. 359, 83 Am. Dec. 118; Velsian, 15 Or. 539, 3 Am. St. 184.

General denial sufficient for all defenses. McKyring: 33.

Title to real estate cannot be litigated in replevin action. Hines, 128 Cal. 38, 79 Am. St. 22. When sustainable. Sinnott, 165 N. Y. 444, 80 Am. St. 736-767, ext. n.

Generally: See Cobbe; Wells; Shinn; 1 Chit. Pl. 181-186, 16th Am. ed., 4 Suth. Dam. 1142-1162, 2 Gr. Ev. 560-570; Anderson, 34 Ill. 436, 85 Am. Dec. 318; Pusey (chattel having a singular value).

REPLICATION (Lat. *Replicare*, to fold back). It is the plaintiff's response to the defendant's plea or answer. To this use it should never be confined. It should never be construed a substitute for other documents, for antecedent pleadings. See AIDER; Windsor: 1; CONSTRUCTIVE NOTICE.

It is substantially the same in all systems. It is indispensable for an issue upon new matter tendered by the plea or answer, and for matter in confession or avoidance of new matter presented in the plea or answer, whereever pleadings are mandatory and cannot be waived. Quod ab initio.

Kollock; Munday: 79: cases; Sto. Eq. Pl. 877, 879, 881; Mitford, Eq. Pl., by Jeremy, 323; 2 Bouv. 885, 886; And. Dlc., Bliss, Pl. 393-397; Phillips, Pl. 267-274; Maxw. Pl. 557-567. See MANDATORY RECORD; REMOVAL OF CAUSES.

It should contain: 1st. Specific denials of allegations of new matter in the answer. Otherwise, on principle, they are admitted. Maxw. Code Pl. 557; Sto. Eq. 881.

2d. New matter in confession and avoidance, if responsive to the answer and not a departure. Maxw. Pl. 273; McKyring (code): 33; Bouv. Dlc. (Replication).

Is required for the formation of an issue which must appear from the mandatory record. An issue cannot appear from the statutory record, which is not designed for the purpose of showing what the issues are. It is for other purposes entirely; it is for an appellee for use in an appellate court. It is to prevent matter that should not and cannot appear from the mandatory record. The conclusion of the statutory record indicates its functions. § 8, Hughes' Proc. *Verba intentione debent inservire; Expressio unius*, etc. But the foregoing views are denied in many states. Munday: 79: cases; Henderson, Chancery Prac. 521, 522: cases; Van Zile, Eq. Pl. 242 (a reply cannot be waived); 16 Cyc. 383; 320-324.

A reply is essential for an issue to new matter in the answer. It cannot be waived. Israel: 83; Munday: 79; Sto. Eq. Pl. 893; Hubler v. Pullen (Ind.); Allenspach v. Wagner (allegations in answer are admitted without a reply, and evidence against such admission is inadmissible); Bradbury: 35; Bissell: 42; Borkenhagen: 81; Sto. Pl. 893. *Contra*: A reply may be waived. Quimby v. Boyd (Colo.); Kingman, 182 Ill. 256, 74 Am. St. 169, n.; Trout, 81 Am. Dec. 326, n. The answer is admitted without. 215 Ill. 235, id. 58; Deatrick (1907), 107 Va. 602. See ISSUES. To counterclaim is waived if not

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objected to. Northern, 123 Wis. 1, 107 Am. St. 984; Roden: 12b.

One view is that the high policies of procedure depend upon the mandatory record and that all essential parts of it for their maintenance are mandatory. The record stands or falls by itself; it cannot be made or supplied by the statutory record without introducing a different kind of procedure. Cases which hold that no reply is necessary where the code does not provide for it stand for a great change in the law, and for the uses of the records upon which a certain and definite theory depend.

For such departures we cite: Viele, 26 Ia. 9, 96 Am. Dec. 83 (code must expressly provide for). A reply may be waived or abolished. Ferguson: 264; Van Zile, Eq. Pl. 242; Brooks v. Mead (1844), Walk. Chan. (Mich.) 389; Henderson, Chan. Prac. 521, 522: cases, sub Munday: 79. Chitty thought a reply could be waived. Bliss, Pl. 442. Bouvier is most equivocal, at least. See Bouv. Dlc. (Departure; Replication). See RECORD; PROCEDURE; PLEADINGS; §§ 1-20, Hughes' Proc.

The conserving or dominating principles of procedure require the mandatory record, and that "what should appear of record must be proved by record." Iversille: 46; Bates: 225. See *Res adjudicata*.

A reply can neither add to nor subtract from the matter that properly appears in the statement of the cause of action. It cannot add a complaint. Devine; 2 Cyc. 691.

Codes cannot dispense with essential things for the due process of law for the due administration of justice. Indianapolis: 223; Bates: 225; Kollock. See §§ 1-10, 13, Hughes' Proc.

Replication may be filed *nunc pro tunc* during the trial and without leave. Keator, 144 U. S. 434: cases; Sto. Pl. 881.

Admissions upon the mandatory record are conclusive, and evidence aliunde is unavailing to affect the higher evidence. Bradbury: 35. The rationale requiring replication is the same in all systems. See ISSUES; §§ 1-10, Hughes' Proc.; §§ 83-123, Gr. & Rud.

The demurrer searches the whole record (mandatory record). Bliss, Pl. 417a. Of course the motion in arrest attaches to errors shown from that record, also objections upon collateral attack. Pleadings limit the jurisdiction of the court. Munday: 79; *Ad damnum*. Constructive notice depends upon the same record, and not from matter in the statutory record. From all these viewpoints we can see that "what ought to be of record must be proved by record," and this means the proper record.

Aider of antecedent pleadings by a reply. Jurisdiction of a subject-matter is conferred by pleadings, and by a right pleading from the proper party, and filed by the clerk or proper official. See DIVISION OF STATE POWER. The functions of a clerk cannot be construed out of the scheme. Jurisdiction of a subject-matter must be conferred by an initial and proper pleading. Upon principle, its defects of substance is not aided by subsequent pleadings, and never by the statutory

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record. *Quod ab initio*. Sanborn: 61. A bill in equity must be sufficient. Sto. Pl., § 10. Likewise an indictment. Codes generally follow the equity rule; they expressly provide that the complaint (or petition) shall state a cause of action, and that the filing of an answer will not waive this. See MANDATORY RECORD.

A reply will not add a complaint. 177 U. S. 78. See REMOVAL OF CAUSES. *Contra*: Storage, 25 Colo. 87; Johnson, 12 Colo. App. 17: cases. See Boyd: 62: cases; McArthur: 99: cases (the rationale of constructive notice is opposed to such waiver); Farmers, 62 Neb. 213, 97 Am. St. 625 (cause of action may first appear in).

Alder of the mandatory record from the statutory record is far more objectionable to a certain and definite theory than alder of an antecedent pleading by a subsequent one. Still many cases can be cited to uphold such extraordinary alder.

A reply must be responsive to antecedent pleadings and consistent therewith; must answer all it professes to answer; if bad in part, is bad altogether. Rison: 253; directly, without departing from the material allegations of the first statement of the cause in any material matter, with certainty and without duplicity. See Bouv. Dic.; CERTAINTY; DUPLICITY; REPLICATION; DEPARTURE (rule of forbidding is in some states held directory).

Jurisdiction depends on the allegations, the denial and the issue. Codes are most clear and consistent in their requirements for a record that will support and serve the dominating principles already mentioned, and particularly that basic rule of evidence, namely, "what ought to be of record must be proved by record and by the right record." Munday: 79; Iverslie: 46: cases; Shutte: 291.

A plea of *Res adjudicata* was a sham and a myth because its matter was first presented as a counterclaim, which was not heard on the merits because it could not be; it was properly dismissed. Still if it is pleaded as *Res adjudicata*, and a plaintiff replies thereto, the reply cures the answer or plea. Rensberger.

✓ **REPLICATIONS DE INJURIA**: Crogate's Case, Smith, Lead. Cas.; And. Dic.; Rice.

REPLY: See REPLICATION.

✓ **REPUGNANCY IN A PLEADING**: Destroys it. Pain: 107; Dovaston: 217; Moynahan. See ALTERNATIVE PLEADINGS; Graver: 103; *Allegans*, etc.; Max. No. 5; §§ 181-185, Hughes' Proc.; Nonsense: 2 Bouv. Dic. 519.

Vitiates a plea of *res adjudicata*. See *Res adjudicata*. Certainty, not pleadings that are "fish, flesh or fowl," is demanded. Kewaunee: 29. *Posito*, etc., Rideout. Cf. Rensberger. See LITERATURE; MAXIMS.

Repugnant pleadings void. §§ 91, 253, Gr. & Rud.; Pain: 107.

Admissions control denials. Dickson: 34: Crater; *Verba generalia*, etc. Pleadings must not be insensible nor repugnant. Exceptions record, or bill of exceptions, is nullified by repugnancy. Greene, 49 Neb. 546, 59 Am. St. 560.

Repugnant defenses may be pleaded. Ansley. See P. v. McCumber: 110; Dickson: 34; Bell v. Brown. First statement is pre-

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ferred in construction. 1 Chit. Pl. 231, 12 Am. ed.

Is fatal to estoppel of record. Dovaston: 217; Moynahan; Rule 8. *Res adjudicata*.

Jurisdiction of a particular subject-matter depends on pleadings; these are but a power of attorney, figuratively speaking. If a pleading is repugnant, this is destructive of its functions for estoppel and other purposes. A denial must not be repugnant nor inconsistent with an admission. Dickson: 34; Pain: 107.

Legislatures cannot authorize. Indianapolis R. R.: 223. A protestation must not be repugnant. See PROTESTATION.

One cannot stand on the point that no demand was made in replevin and at the same time make an inconsistent plea claiming the property by paramount title. Wells, Replev. 372. Underwriters cannot deny their liability under the contract for insurance and at the same time stand upon the point that conditions precedent were not complied with, such as furnishing preliminary proofs. Such positions are inconsistent and will not be permitted. German, 100 Ky. 29, 66 Am. St. 325; Angier, 10 So. Dak. 82, 66 Am. St. 684. See Dickson: 34.

Repugnant evidence. A party is bound by the testimony of his own witness, when his is the only evidence on the point introduced. Chappel, 27 Wash. 63, 91 Am. St. 820; *Allegans*.

Repugnant clauses in a contract: the first prevails. 2 Whart. Const. 673. Repugnancy is fatal to a contract. Barnard: 108. Also to a pleading. Dickson: 34. See Bell v. Brown: Pain: 107.

Opposes the maxim *Allegans contraria*; and the requirements of *Res adjudicata*. Moynahan, sub Russell v. Shurtleff; *Verba fortius*.

Repugnancy in statutes is excluded, if possible, by construction. End. Stat., § 182. See ABSURDITY. Last cause controls. See *Ut res magis valeat*.

REPUTATION: When admissible in evidence. McClain, C. L., q. v.; C. v. Ganett: 213g. See CHARACTER.

REQUEST: When it implies a promise. Lamplough: 301; Van Houten.

RES ACCESSORIA SEQUITUR REM principalem: An accessory follows its principal. Bro. Max. 491. A principal thing carries its incidents. *Accessorium*; M'Culloch: 147.

✓ **RES ADJUDICATA**: Is the III conserving principle of procedure. §§ 91, 171-200, Gr. & Rud. It is often discussed as *Estoppel of Record*, *Former Jeopardy* and *Former Adjudication*. Its record requirements practically coincide with requirements of Appellate Procedure and requirements to resist objections upon collateral attack and other conserving principles. §§ 83-123, Gr. & Rud. It is the most important branch of estoppel law; it is an important branch of evidence; it profoundly involves evidence, pleading, practice, parties and procedure in general. The primal rule of evidence, namely, "what ought to be of record must be proved by record and by the right record" is a rule essential for the operation of a constitutionalism, a study of which involves *res adjudicata*, and especially that part of it called *former jeopardy*. U. S. v. Perez: 69: cases.

Res adjudicata rests upon principles of the unwritten constitution,

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and particularly the maxim, *Inter est reipublicæ ut sit finis litium*. Courts cannot be induced to consider and adjudge a cause again and again and again; that would be vain and fruitless, it would be absurd. *Inter est reipublicæ*.

Around the principles of *res adjudicata* a constitutionalism can be evolved. These principles involve such as *De non apparentibus et non existentibus eadem est ratio* (what is not juridically presented cannot be judicially considered), *Frustra probatur quod probatum non relevat* (It is vain to prove what is not alleged) and *Verba fortius accipiuntur contra proferentem* (every presumption is against a pleader). This last maxim is paraphrased and is expressed thus, *estoppels are odious and must be certain to every intent*; this is classed as the IV rule of *res adjudicata* yet to be mentioned.

Maxims of Estoppel are fundamental principles from the Roman, Norman and English constitution. Important ones of these are:

1. *Nemo debet bis vexari pro una et eadem causa*: No one ought to be twice vexed for the same cause.
2. *Allegans contraria non est audiendus*: He is not to be heard who alleges things contradictory to each other.
3. *Interest reipublicæ ut sit finis litium*: It concerns the public that there be an end to litigation.
4. *Ex dolo malo non oritur actio*: A right of action cannot arise out of fraud.
5. *Nullus commodum capere potest de injuria sua propria*: No one shall take advantage of his own wrong.
6. *Allegans suam turpitudinem non est audiendus*: One alleging his own infamy is not to be heard.
7. *Contumacia eorum qui jus dicenti non obtemperant litis damno coercetur*: The contumacy of those who disobey him who gives a judicial decision is liable for the judgment given.
8. *Si citatus aliquis non compareat habetur pro consentiente*: If, being summoned, a person does not appear, he will be regarded as having consented.
9. *Qui non negat fatetur*: He who does not deny admits.
10. *Audi alteram partem*: The law hears before it decides.

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11. *De non apparentibus et non existentibus eadem est ratio*: The law is the same respecting things which do not appear and those which do, not exist; or, facts must judicially appear before they can be considered; or, what is not juridically presented can not be judicially considered.

12. *Quod ab initio non valet, intractu temporis non convalescet*: What is not good in the beginning does not by lapse of time become valid.

13. *Frustra probatur quod probatum non relevat*: It is vain and fruitless to prove what is not alleged.

14. *Expressio unius est exclusio alterius*: The express mention of one implies the exclusion of another.

15. *Verba fortius accipiuntur contra proferentem*: Every presumption is against the composer; or as otherwise expressed, the words of an instrument shall be taken most strongly against the party employing them; or, every presumption is against a pleader.

16. *Debile fundamentum fallit opus*: Where the foundation fails all goes to the ground.

17. *Nemo debet esse iudex in propria sua causa*: No one should be judge in his own cause.

18. *What ought to be of record must be proved by record and by the right record. Expressio unius. See IDENTIFICATION; DESCRIPTION; ALLEGATIONS; JURISDICTION; De non apparentibus.*

When the supreme court of the United States decides that each state may have a *res adjudicata* of its own and that the conclusions of state courts as to that bind the federal judiciary, then it surrenders a jurisdiction vested in it. The high federal court cannot congruously defend "due process of law" without regard to the elements of *res adjudicata*. To support these views we offer §§ 171-261, *Grounds and Rudiments*, Vol. I. There are American courts which do not know what due process of law is, as will be seen by a reference to the decisions cited. They do not know that the elements of *res adjudicata* are the elements of "due process of law." And of the latter it has been said that it means nothing. Hahn v. Kelly.

Res judicata facit ex albo nigrum, ex nigro album, ex curvo rectum, ex recto curvum: A thing adjudged makes white, black; black, white; the crooked, straight; the straight, crooked. Brittain: 50; Kirven: Potter v. Clapp, 203 Ill. 592, 96 Am. St. 322; *Interest reipublicæ*; *Posito*; *Allegans. Leading Cases*: Kingston's: 76; Outram: 25; Cromwell: 26; Russell: 27; Wright: 28; U. S. v. Perez: 69; R. v. Vaux: 72; R. v.

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Vandercomb: 73; C. v. Roby: 74; Guedel: 74a; R. v. O'Brien: 75; Mondel: 77; Trevivan: 78; Munday: 79; Dovaston: 217; Perez: 2e; Grafton v. U. S., 206 U. S. 333; cases; Sache v. Wallace; Draper v. Medlock; Ruckman v. R. R.; Bristow: 135; cases; Kirven.

The Mandatory Record, the rules for its establishment and vindication are the basis of *res adjudicata*. See ABATEMENT; CODES; CERTAINTY; CONSTITUTIONALISM; GOVERNMENT.

The literature involving *res adjudicata* is open to much criticism. § 171a, Gr. & Rud. Works on trials, trial tactics, practice tactics, evidence, pleading, practice, parties, arguments and briefs that do not define and discuss the Mandatory Record and the Statutory Record, the conserving principles and upon what they depend are greatly responsible for the hopeless tangle presented by the various courts. The works that teach that pleadings can be waived are certainly vicious (*Quod ab initio*); necessarily they teach that the grounds of the general demurrer can be waived; that the general demurrer does not search the entire record and attach to the first fault; that the Statutory Record may be substituted for the Mandatory; that the mandatory requirements of a constitutionalism can be waived (§ 56, Gr. & Rud.); that variances and departures are permissible; that legislatures can control and abolish the essentials of a judiciary and prescribe for the courts rules of construction. See CODES; CONSTRUCTION. Such works have brought upon the due administration of the laws a deplorable condition. Indeed, the actual situation is unbelievable. See Preface, Datum Posts, also Grounds and Rudiments; Illinois Law Review, May (1908). The student is to be pitied who has no friends who can direct him away from highly commended but vicious and misleading pages. The reader can judge of the condition by connectedly considering 2 *Thompson's Trials*, §§ 2310, 2311; 1 *Bates' Pleading, Practice, Parties and Forms*, 511, 512 on the one hand, and *Story's Pleading*, § 10; 1 *Greenleaf's Evidence*, 63; 2 *Id.* 7; 3 *id.* 10; *Rushton*: 5; *Dovaston*: 217; *U. S. v. Cruikshank*: 232 on the other; also code cases like *Draper*, *Ruckman* and *Sache*. From these pages it can be seen that there are prominent works that are written by intellects not instructed in the fundamentals of jurisprudence; they

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have not been introduced to its datum posts. The mischiefs wrought by popular and widely sold books, on the titles we have mentioned, cannot be estimated. They have befogged the courts and lawyers; they have destroyed the value of supreme court reports in many states and consequently the value of all founded on these reports, such as digests and encyclopedias. See MISSOURI; ILLINOIS; COLORADO; NEW YORK. Thus they have given the enemies of government much room for calling into question the usefulness of government and its respectability. Justinian justly dreaded what the ignorant author or incompetent culler in the employ of irresponsible publishers would certainly call down upon his empire; it is unbelievable what has happened in America; the calamity may be somewhat glinted from *res adjudicata*. §§ 24, 25, 170-261, Gr. & Rud. *Multitudo imperitorum perdit curiam*. § 193, Gr. & Rud.

The morality, usefulness, simplicity and antiquity of jurisprudence may be well judged from a congruous discussion of estoppel of record. And while it is a most technical and refined subject still it is powerfully instructive; for all of these ends it is entitled to prominent mention and the most careful study. §§ 171-200, Gr. & Rud.; §§ 121-146, Hughes' Proc.

The civil law of Rome gives the maxims that are the roots of *res adjudicata* along with equity jurisprudence. §§ 42, 91, Gr. & Rud. Therefore *res adjudicata* is largely equitable conception and development. And it is a historical fact that these subjects have been developed abreast in England and America. Still this important fact must be gathered from here and there and learned in shreds and patches.

Bro. Max. 327; §§ 26, 27, 29, 65-67, 87, 101, 112, 120, 121, 125, 127, 143, 146, 152, 182, 216, 242, 255, 306, 334, 337, 351, Hughes' Proc. It is a conserving principle. §§ 91, 223, Gr. & Rud.

The leading rules of *res adjudicata* may be picked out of the *Kingston Case*: 76 (1774). Its maxims, rules and requirements have been incorporated in all systems of procedure; these principles when rightly taught are traceable from the same fountain; rivulet works impede and mislead; they are born of selfishness,

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ignorance and misrepresentation. A work on judgments that denounces the maxims from the above viewpoint is spoiled paper and boards, if indeed it is not vicious. See Ram on Judgments, § 49. *Melius est petere fontes quam sectari rivulos.*

Due process of law when defined will not exclude the fundamental principles of *res adjudicata*; they lie at the roots of procedure, of the due administration of the laws. Indeed, in a general way judicial due process of law might be quite well defined thus: *Due process of law is a judicial proceeding that will sustain a plea of res adjudicata and resist objections upon collateral attack (that is not vitiated by usurpation).*

The following rules, cases and the maxims cited herein are offered to sustain the view that the above definition is properly deduced.

Views from *res adjudicata* and *collateral attack* (§§ 161-262, Gr. & Rud.) put procedure in a new light. Works on pleading, evidence and practice and cognate subjects, such as trials, trial and practice tactics, and the art of winning cases, which omit those views present their discussions from molehills and not from Mount Everests. Such works may be likened to the house founded on the sand. See Preface, Datum Posts. Viewed from dominating heights these datum posts of jurisprudence appear as initials from which procedure, indeed government itself, is evolved. As a structure is drawn from *datum posts*, so are legal subjects. From dominating initials starts the philosophy of the law. Where the philosophy of the law is lost the law is lost.

All systems incorporating Res adjudicata incorporate the same thing. Therefore, *res adjudicata*, its essentials and fundamental rules, are common to all systems recognizing it. From this fact much may be deduced to show that there is a unity of all systems. It is enumerated as a conserving principle of procedure; it is inseparably interwoven with others, and especially the fourteenth, namely, "what ought to be of record must be proved by record, and by the right record." § 104, Gr. & Rud. This is a rule of the best evidence. The best evidence of which a case in its nature

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is susceptible must be produced. *Iverslie*: 46; cases. Legislatures can not abolish this record in a constitutionalism. *Lex non exacte.*

The *Res adjudicata* of the Roman law depended wholly and alone upon the mandatory record. The statutory record was never intended for the means and support of *res adjudicata*. *Verba intentione; Expressio unius.* Consequently pleadings cannot be waived. Otherwise *Res adjudicata* would have to be proved by evidence *aliunde*. Fayerweather.

For the mandatory record and its essential matters to prove *Res adjudicata* there applies with great force. *Expressio unius.* §§ 87, 242, Hughes' Proc.

1 Gr. Ev. 63; *id.* 7; *id.* 10; Sto. Pl. 10. See EQUITY; Bouv. Dic. 898-900.

Departures, variances, ambiguities and uncertainties are inimical to requirements of Res adjudicata. The equivocal and repugnant pleading or record will not suffice. Relating to its requirements are many rules of pleading and evidence. L.C. 25-30; 48-50; 69-79. It involves much that relates to the mandatory record. The certain mandatory record is essential for *res adjudicata*. It must properly appear with certainty.

The rules in *Rushton*: 5; *Bristow*: 135, and *Perry*: 136a are reflected rules from the requirements of *Res adjudicata*. They are interactions.

The states wherein pleadings and the mandatory record are waived carve out and set up defenses of *Res adjudicata* from any one of several kinds of matter.

See MISSOURI; COLORADO; ILLINOIS; INDIANA; OHIO. 2 Thomp. Tri. 2310, 2311; 1 Bates, Pleading, Practice, Parties and Forms, 511, 512. THEORY OF THE CASE; WAIVER; §§ 13-18, Hughes' Proc.

The assumption that there are different kinds of estoppels in different systems of procedure, and that there can be estoppel of record without the right (the mandatory) record, is neither supported by the history of the question nor by reason.

It is well to observe that the last proposition involves the record rule, also many of its cognate rules. See ORAL EVIDENCE; *Mondel*: 77; *Fayerweather*. § 104, Gr. & Rud.

All jurisprudences that incorporate the law of the estoppels become closely allied, if not identical in substance.

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The law of estoppel pervades the entire law. Many contracts are affected by an application of *Res adjudicata*, which is one of the estoppels, namely, estoppel of record. Judgments and deeds are contracts; one greatly involves estoppel of record and the other estoppel by deed. *See* ESTOPPEL. The contract relation of the subject is well presented in *Marriot*. Successive coupons were affected in *Cromwell*: 26; notes, in *Gardner, sub Outram*: 25. In the last case the effect of estoppel of record arose in relation to deeds and conveyances of land, and how the title thereto was affected by estoppel.

The rationale of the subject involves Allegans contraria, etc. The latter being a part of *Salus populi suprema lex*, its leading rules are discussed in relation to *Kingston*: 76; *Outram*: 25; *Cromwell*: 26; *Russell*: 27, and *Wright*: 28.

Nemo debet bis vexari, etc., is one of the fundamental principles of the common law. *Max. No. 7, Hughes' Proc.*; §§ 121-146, *id.* A part of it, namely, what relates to former jeopardy, is reaffirmed in constitutions. But the common-law principle is just as binding. Courts are bound to protect the latter. 2 *Kent*, 8, 12; *Nemo tenetur*.

Res adjudicata depends upon the mandatory record for its presentation as a defense. Its rules suggest this. From this fact appears why there must be certain pleadings, and why they must prove what they are designed for *inter alia*. *S. v. Thurstin*: 23 and *C. v. Roby*: 74. *See* CODES.

The discussions of the subject are vast and already fill great volumes. Under the title *LITERATURE, ante*, observations are made relating to the subject. It would exceed the province of this work to attempt anything like an outline of the subject, which is in a great tangle, and especially in jurisdictions where pleadings can be waived and judges can declare and enforce arbitrary edicts.

An unsettled law of estoppel disturbs the entire body of the law. §§ 171-200, *Gr. & Rud.*

The condition of *Res adjudicata* in American states may be judged from two very recent cases, namely, *Rensberger* (1903, *Colo.*), and *Fayerweather* (1904), *sub nom. Amherst College v. Ritch* (1897), 151 *N. Y.* 282; 195 *U. S.* 276 (very instructive

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case), 91 *Fed.* 720 (defining due process of law).

It seems well to state that cases are abundant to support any of the following rules:

1. *That the record need not be pleaded.* *See* *MISSOURI*; *COLORADO*; *LITERATURE*; *CODES*.

2. *That the record is admissible without pleading it, in which case the court is at liberty to disregard it.*

3. *That the record, if pleaded and proved, is of binding effect upon the court.* *See* *Kingston's Case*: 76; *Bonnell*: 185; cases; *McAfee*.

4. *That in equity and under codes it is waived, unless pleaded if an opportunity was presented to plead it.*

Res adjudicata is one of the conserving principles of procedure. § 91, *Gr. & Rud.* For it construction bends, excluding and including as is necessary for its protective effect in a constitutionalism. *In presentia majoris cessat potentia minoris.* (*See* *C. v. Roby*: 74; *R. v. Waters*: 71.) For it statutes are expanded or contracted. *Bates*: 225. Its requirements are mandatory, and that upon which it depends is included by construction. *Indianapolis*: 223. Its rules are dominant rules of pleading. *Outram*: 25; *Starbuck*: 263; *Slater*, 51 *Neb.* 108, 66 *Am. St.* 445, n.; notes to *Dovaston*: 217.

The mandatory record is essential for res adjudicata. It depends upon that record as a base, which is conceived to support the several conserving principles elsewhere enumerated (§§ 85-104, *Gr. & Rud.*), and of which *res adjudicata* is a leading one. It pervades the scheme of government, and is essential in its plan of protection, education and morals. From discussions of former jeopardy its uses are discoverable. In many relations the doctrine enforces the maxim *Ignorantia legis neminem excusat*, which imperatively requires intelligence and enforces education. It also requires consistency and morals, as will appear from considerations of *Allegans contraria non est audiendus* and *Falsus in uno falsus in omnibus*. These features appear from discussions of *Kingston's Case*: 76.

Pleading is one of the most important parts of the mandatory record, in considerations of *res adjudicata*. *Sache*; *Munday*: 79; cases. This appears from works on *res adjudicata*,

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which treat so largely of what concerns evidence, pleading and practice (procedure), and the mandatory record, upon which all of these subjects depend. Several rules of *res adjudicata* are but leading rules of pleading. The works on pleading, however, point out no extensive relationship of these subjects.

See And. Steph. Pl., § 188; Sto. Pl. 790-794 (instructive resume); Womack; see MISSOURI.

The rule of construction in Dovaston: 217 (every presumption is against a pleader) is a rule of *res adjudicata*, viz.: that *testopels* are odious and are strictly taken. Notes, Lampligh: 301; *Verba fortius accipiuntur contra proferentem* (Max. No. 19, §§ 215-222, Hughes' Proc.); Lea: 30; Hoover, 43 Or. 281, 65 L. R. A. 790 (upon which issues a judgment is founded, is important); Pain: 107.

Res adjudicata; conclusiveness of judgments. Windsor: 1; Harvey: 32; Audi; Outram; Barrs; Aspden; Fischli, *infra*; 180 U. S. 480, n.: cases.

Foreign judgments; conclusiveness of. Hughes v. Cornelius; Lazier.

Parties must be the same and sue in the same capacity. Fuller; McComb. See Aspden; Sonnenberg, 9 So. Dak. 518, 62 Am. St. 885 (one may sue as an individual and afterward as a trustee); Sto. Pl. 791; Barrs; Outram: 26; Cromwell: 26; Wright: 28. See FOUR IDENTITIES.

Suit must be for some purpose. See TRESPASS TO TRY TITLE; 107 Am. St. 596; Aurora.

Parties and privies bound by. Outram: 25; Cromwell: 26.

Landlord and tenant; those in privity. 75 Ark. 1, 112 Am. St. 17-42.

Surety not bound by judgment against officer. Johnson, 17 Mont. 448, 52 L. R. A. 185-188, ext. n.

Real party in litigation, whether named on record or not, concluded. Lovejoy: 289; Kingston: 76; Bauerman: 48; Wright: 28; Fayerweather (1904), 195 U. S. 276.

One controlling litigation is bound by it. Lovejoy: 289; Bauerman: 48; Wright: 28. *Notice of suit to indemnitor concludes.* Lovejoy: 289.

Application of, depends on issues shown from the pleadings. Outram: 25; Cromwell: 26; Windsor: 1; Munday: 79; Kingston: 76; Wright: 28; Nelson; Mondel: 77; Harvey: 32; Fayerweather.

Records must be inspected to determine the issues. Outram: 25; Sto. Pl. 791; Wright: 28; Packet Co.; Reynolds: 79a; Munday: 79; Nelson; Greeley; Sache; McLaughlin: 31; Kewaunee: 29. See VARIANCE; cases; Israel: 83; cases.

A defense of, not pleaded in one independent action may be made in a subsequent independent action. Howlett.

A cause of issue controverted and finally settled on the merits cannot be raised in any other form. Nelson; Mondel: 77; Martin v. Evans; Langmead; Hoggatt; Bro. Max. 327; 180 U. S. 480, n.: cases; Kirven; Perez: 2e.

Issues essential for. Mitchell, 180 U. S. 471, 481; Mountain, 180 U. S. 533 (resort cannot be had to judicial knowledge to raise controversies not presented by the pleadings). See Breeze; 195 U. S. 276; Russell: 27; cases.

Conceptions of pleadings, to give notice to the adverse side, and to inform the

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court of what is to be tried only, is not sufficiently comprehensive. See VARIANCE; DEPARTURE; 195 U. S. 434; IDENTIFICATION. Upon pleadings depend more than uses before and at the trial, and accordingly they should be so defined. See PLEADINGS; Russell: 27.

Departments of state; decisions by one bind others. Lounsdaile; Dennett: 145. *Crown or state barred by acquittal in criminal cases.* E. v. Duncan; F. v. Corning, 195 U. S. 133; 48 Am. St. 213, 214; C. v. Cummings, sub S. v. Croteau: 271.

Motions in practice are not res adjudicata. Chichester. But cannot be repeated. Bonesteel: 151; Chichester. See Colo. cases, sub Blair: 170; 88 Am. St. 749.

Successive recoveries allowed upon judgment. Hummer, sub Boni judicis. Also against joint trespasser. Lovejoy: 289. Entirety of claims and damages. Bendernagle; Nelson.

Oral evidence admissible to show what was tried. Gardner; Cromwell: 26; Wright: 28; Packet Co. v. Sickles. See ORAL EVIDENCE; Mondel: 77; Fayerweather (but this evidence must be consistent with the pleadings—the record).

Evidence aliunde to show what was tried. Kingston: 76; Gardner v. Buckbee. See ORAL EVIDENCE; BEST EVIDENCE; Iverslie: 46; Mondel: 77; Draper.

Mandatory record alone can show what was decided. Outram: 25; Sto. Pl. 791; Kingston: 76; Wright: 28; Lea: 30; Audi, etc.; Russell: 27; Starbuck: 263; Maddux, 129 Cal. 665, 79 Am. St. 143, n.; 195 U. S. 276; cases (instructive case).

Form of the plea. Starbuck v. Murray: 263. *Oral evidence admissible to prove issues in justices' courts.* S. v. Meek (1900), 112 Ia. 338, 84 Am. St. 332. See Bates: 225; Fayerweather (Judge can not testify as to what issues he passed on).

Splitting causes of action not permissible. Perez: 2e; Hahl v. Sugo. Items of a running, mutual and current account cannot be sued upon successively. Bendernagle; Gradwohl; Grain.

Recovery at law ends litigation. Marriot; Nelson v. Couch; Wheadon. See Graver: 103; Sto. Pl. 791; Wright: 28; 180 U. S. 480.

Important rules; distinctions. Cromwell: 26, cited, 195 U. S. 300; Nelson v. Couch; Aurora; Aspden; Wright: 28; Audi, etc.

Parties bound by. Cromwell: 26; Outram: 25; Greeley.

"All that might have been decided is presumed to have been." Perez: 2e; Fayerweather (instructive case); Rowell, 123 Wis. 510, 102 N. W. 1-9; Cromwell: 26; Kingston's Case: 76; Wright: 28; Marriot; Nelson; Mondel: 77; Packet Co.; Fischli; Van Fleet, Coll. Att., § 17; Gross v. P. (1904), 193 Ill. 260, 86 Am. St. 322.

This rule arises when successive suits are brought on the same demand, or when an entire suit is split, and parts of it are sued for. Bell, 184 Pa. 296, 63 Am. St. 795, n.; Royster, 86 Md. 249, 63 Am. St. 510; 180 U. S. 480, n.: cases; Sunkler, 127 Cal. 554, 78 Am. St. 86; Freeman, 131 Cal. 386, 82 Am. St. 355; Perez: 2e.

What matters and what issues are concluded. Allen, 201 Pa. 79. *Interest reipublicæ*, etc.; *Nemo debet bis vexari*, etc.; *Allegans*, etc.; *Salus populi*, etc., are the leading maxims. Kingston's Case: 76; Sto. Pl. 182. Formerly the defense need

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not be pleaded: It was analogous to the *In part delicto*, etc., matter or defenses. To the extent the defense must be pleaded, the basic maxim has been modified. *Interest reipublicæ*.

Interest reipublicæ ut sit finis litium is a principle of the unwritten constitution, and it is equally protected whether it arises in the criminal or in the civil case. In the criminal case it is called *former jeopardy*, while in the civil case *former adjudication*, or *res adjudicata*. Former jeopardy is expressly provided for by written constitutions, while former adjudication is a bar depending on precedent. However, the principle is technically safeguarded thereby. *Case v. Beauregard* (1879), 101 U. S. 688.

Municipal corporations bound by estoppel. *Cromwell*: 26; *Knox County*.

Dismissal of a bill is prima facie presumed on its merits. *Baker*, 181 U. S. 117; *Langmead*. But the contrary, if it appears or can be gathered from the entire record, is preferred, for estoppels are odious. *Cf. Rensberger* (Colo.).

Certainty is essential for the defense. It is strictly judged. *Bro. Max*. 187; *Pain*: 107. See CERTAINTY; pp. 8-17; §§ 4, 13, *Hughes' Proc.*

Abatement pleas (2 Gr. Ev. 18-27) and estoppels are pleaded and governed by same rules of certainty. *And. Steph. Pl.*, § 188 (Tyl. ed. 316); *Bro. Max*. 177, 327, *Bliss*, Pl. 364. See CERTAINTY.

Every presumption is against the pleader. *Outram*: 25; *Cromwell*: 26; *Kingston*: 76; *Aspden*; *Dovaston*: 217; *Harvey v. Brydges*; *Verba fortius*. This maxim must be well comprehended by the practitioner. Elsewhere it is called the "mystic rule." See PROCEDURE; CODES; CONSTRUCTION.

Res adjudicata pleas are odious and must be certain to every intent. *Kingston*: 76. They are pleaded like fraud or crime, or the equitable exceptions to the statute of frauds.

Hearing and procedure must be fair. Fraud will vitiate. *Fayerweather* (due process of law); *Graver*: 103; *Ferguson*: 264; *Borden*: 267; *Starbuck*: 263; *Windsor*: 1; cases; *Kingston*: 76; *Davidson v. New Orleans*; *Nelson v. Couch*; *Greeley v. Smith*; *Sto. Pl.* 794; *Rouse*. See *Rensberger* (Colo.).

Opinions; dicta will not constitute nor support. *Cohens*: 244; *Kingston*: 76; *Munday*: 79; *S. v. Baughman*: 268. The matter for, is the mandatory record. *Martin v. Evans*; *Expressio unius*. See DICTUM. The matter constituting the plea must be pleaded, and if put in issue then that matter must be produced and shown from the right record, the mandatory record, not the statutory record nor the opinions nor dicta of courts. *Cf. Breeze* (Colo.). *Expressio unius*; § 13, *Hughes' Proc.*

Following are fourteen rules stated:

Rule 1. Coram judice proceedings essential.

Windsor: 1; *Freem. Judg.*; *Kingston*: 76; *Munday*: 79; *Starbuck*: 263; *Piper*: 114; *Horan*: 85. See *Audi*, etc.; *Coram judice*. What are *coram judice*: *Kingston*: 76; *Sto. Pl.* 782-784, 791-794. COLLATERAL ATTACK; *Cooper v. Reynolds* was *coram judice* (*Field, J.*, dissenting); *Borden*: 267 was *coram non judice*; also the record in *Crepps*: 113; also *Horan*: 85; *Pennoyer*: 58 and *Windsor*; *Perez*: 2c;

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Grafton, 206 U. S. 333. See *Coram judice*. *Void judgment is not Res adjudicata*. *Christenson*, 17 Utah, 412, 70 Am. St. 794, n. See *Fabula*, etc. *Sache*.

Court must have power—jurisdiction—to enter judgment. *Fayerweather*; *Windsor*: 1; *Milligan's Case*; *Munday*: 79; *Cooper v. Reynolds*; *Nelson v. Couch*; *Audi*, etc.; *Marbury*: 142; cases; *Cohens*: 244; *Sache*. See *Rensberger*.

A court must have jurisdiction and: 1st. *Subject-matter* (*Windsor* and *Cooper Cases*); 2. *Parties*. 3. *Sufficient pleadings* (*Munday*: 79; *Windsor*; *Sache*; *Borden*: 267; *Starbuck*: 263). There must be (1) the record, (2) the law, and (3) the evidence. *Dimick Case*, *sub Iverslie*: 46.

Jurisdiction of subject-matter must affirmatively appear in all cases. *Jurisdiction*; *Kempe's Lessee*: 115; *DUE PROCESS OF LAW*; *De non apparentibus*.

No man can be judge of his own dispute. *Dimes*: 176; *Oakley*: 222; *Nemo debet esse judex*; *Nemo jus sibi dicere potest*. Consequently courts cannot declare issues not presented by the pleadings and decide them. *Nihil habet forum ex scena*; 195 U. S. 276; *Sache*.

The issue must be material. *Kingston's*: 76, cited and approved, *Stokes*, *sub Wright*: 28; *Hitchcock*: 12; *Rule VI*, *post*; *Garland*: 60; *McLaughlin*: 31.

Surplusage is never considered. Utile per inutile non vitiatur.

One claiming the benefits of an adjudication must allege and prove it. *Actore*; *Semper presumitur*; *Cohens*: 244; *Sto. Pl.* 790-794; *Wright*: 28; cases.

A plaintiff is charged with making a sufficient mandatory record. *McArthur*: 99; *Rushton*: 5; *R. v. Wheatley*: 19; *Moore v. C.*: 21; *Williamson v. Berry*: 65; *Horan*: 85; *Cruikshank*: 232.

And this duty never shifts. *Dovaston*: 217; *Lampleigh*: 301; 9 *Encyc. Pl. & Prac.* 625; cases.

How pleaded. Record was pleaded. *Baker v. Cummings* (1901), 181 U. S. 117; *Fayerweather*; *Burton v. U. S.*

Whole record must be presented. *Outram*: 25; *Cromwell*: 26; *Kingston*: 76; *Langmead*; *Nelson v. Couch*; *Wright*: 28. See *Rensberger* (Colo.). *Essentials of Baker*; *Pain*: 107; *Lea*: 30.

The mandatory record not the statutory record must be pleaded. *Sto. Pl.* 791. All those cases that substitute the latter record for the former show that the conserving principles of procedure are misunderstood. *Rules*, *Kingston's Case*: 76; *Herm. Estop.*

Parties are bound only by the records they submit and file with the clerk in the regular way. *Windsor*: 1; *Munday*: 79; *Marbury*: 142; *Cohens*: 244; *Cas.*; *S. v. Baughman*: 268. See *Coram Judice*; *MANDATORY RECORD*.

An authority must be pleaded. *Hopper*: 4. **Precise issue must be shown.** *Outram*: 25; *Wright*: 28; *Taylor v. Castle*; *Gardner v. Buckbee*; *Sto. Pl.* 791; *Cromwell*: 26 (estoppel by verdict).

"Estoppels are odious." 1 *Bliss*, 364. And must be pleaded and proved. *Outram*: 25; *Cromwell*: 26; *Kingston*: 76; *Wright*: 28; *Greeley v. Smith*; *Aspden*; *Lea*: 30. See *Rensberger*.

Certainty essential. *Supra*. *Russell*: cases. **Inquiry after the coram judice proceeding is a complex inquiry** attended with almost all that relates to the conserving principles of procedure. See *Coram Judice*; *CERTAINTY*; *COLLATERAL ATTACK*; *MANDA-*

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TORY RECORD; LITERATURE; RECORD; WAIVER; *Quod ab initio*, etc.

Jurisdiction is always a leading question. Relating to it the cases widely vary, some holding that three things only need appear, namely, jurisdiction of subject-matter, of the person and of place (territory). *Turney v. Barr*; *Fraaman*, 97 Am. St. 650 *sub* Windsor. But other elements are to be considered. *Sache*. See JURISDICTION; *Mostyn*; *Milligan's*. The elements of jurisdiction are not well settled. This fact should be well comprehended. In Illinois only two elements are inquired after in some cases. *Franklin Lodge*.

The coram non judge proceeding will not support a plea of res adjudicata. Now, will it support any of the conserving principles of procedure? See LITERATURE; JURISDICTION; *TURNERY*; DUE PROCESS OF LAW; *Coram Judge*; SUBJECT-MATTER.

Will a *coram non judge* proceeding support a title to property founded thereon? To what extent will such a proceeding impart constructive notice? To what extent is such a proceeding subject to collateral attack? *Fraaman*, *sub* Windsor: 1; LITERATURE. It can be picked out from the cases that the purchaser must take notice of pleadings to confer jurisdiction. *Campbell*: 2; *Munday*: 79; *Windsor*: 1; *Cruikshank*: 232; *Milligan's*; *Caveat emptor*. *Weltmer*: 268a; SUBJECT-MATTER. There is reason to contend that a record if sufficient for one of the conserving principles is sufficient for all of them. *Clem*: 2c.

Still the question is, does this investigation extend throughout all the pleadings, and throughout the entire record, or is it confined to defects in the statement of the cause of action only? In *Munday*: 79 the lack of an answer defeated an execution deed; and likewise in *Windsor*: 1, for striking the answer from the files. In criminal cases the absence of a plea or issue is fatal; likewise where the judge usurps the functions of the jury, and tries and convicts. See *Turney*.

Suppose a record was pleaded in, showing the judge usurped the functions of the jury and tried the accused for crime, would such a record evince a *coram judge* proceeding; would it be a bar from further prosecutions? See *Turney*.

Generally collateral attack tests the coram judge proceeding. Now, are the tests for this proceeding the same in *res adjudicata*, and upon collateral attack? Can the *coram non judge* proceeding satisfy requirements of due process of law? *Perez*: 2e; *Sache*.

The general demurrer searches the whole record (substantial pleadings) and attaches to the first fault, may be applied upon collateral attack, and it seems likewise in tests for *res adjudicata*. And on principle it must in tests for due process of law.

The late case, *Fayerweather*, is a most instructive case. It involves due process of law, *res adjudicata*, the elements of a *coram judge* proceeding, appellate procedure, the functions of the pleadings and the mandatory record; also a very inter-

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esting illustration of a federal question relating to due process of law.

From necessity the defense must be pleaded. It operates somewhat as a matter of abatement and is to bar a second trial. Therefore, the record should be pleaded, and specifically and fully, so the court can compare the records and at a proper time determine whether there is any issue that ought to be tried. *Lex neminem cogit ad vana*, etc. See *Kingston*: 76 (technical and singular rules).

It is a plea of new matter and must be pleaded. *Sto. Pl.* 791-794; *Bro. Max.* 327; *Freem. Judg.* 284; *Wright*: 28. *Former jeopardy must be pleaded.* *R. v. Vaux*: 72. *A fortiori*, the bar must be pleaded in a civil case. It must be pleaded and proved like fraud; it is odious, every presumption is against it. *Smelting Co. v. Reed* (Colo.).

Pleading and proving a former adjudication is one of the most unsettled questions of procedure, as already stated. The first thing to consider is whether estoppel by judgment or by verdict is to be presented. Pleading of the latter involves technical distinctions that must be understood. *Cromwell*: 26.

Estoppel of record depends upon a record, and for pleading and proving it a record must be presented and looked to. For such purposes the mandatory record is conceived and provided for; for such ends the record rule (§ 104, Gr. & Rud.) is strictly applied. *Expressio unius*, etc. *Fayerweather*.

Rule 2. Where the truth appears in the same record.

Kingston's Case; *Allegans contraria*. See REPUGNANCY; *Pain*: 107; *Nihil possumus contra veritatem*.

If within the record-matter pleaded and proved there appear any facts which show that the force and effect claimed for other parts should not be given, then there is no estoppel.

A record is held up and examined within its four corners, and all its parts must be consistent and free from repugnancy, that it may operate as an estoppel; *e. g.*, if it anywhere appears that the judgment was not final, nor on the merits, then this would be fatal to any estoppel. 195 U. S. 276. *Cf. Rensberger*.

Repugnancy destroys a pleading. *Pain*: 107. Also a contract. *Barnard*. Accordingly the rule is, that pleadings should not be in the alternative, nor repugnant nor senseless. *Verba fortius*. The truth from the mandatory record is sought, and especially relating to the following:

"Four identities." 1. Of the thing. 2. Of the cause. 3. Of persons. 4. Quality of persons. *Kingston*: 76; *Bristow*: 135; *McComb*, 149 U. S. 629, *citing* *Cromwell*: 26; *Fuller*, 68 Conn. 55, 57 Am. St. 84 (instructive case); 2 *Black, Judg.* 610; *Freem. Judg.* 250; 1 *Gr. Ev.* 532; 1 *Beach, Eq. Pr.* 309, 310; *Avon Case, sub* *Munday*: 79; *Wells, Res. Adj.*; *Sto. Pl.* 791, 792-794; *Mauldin*, 53 S. C. 285, 69 Am. St. 855; 195 U. S. 276.

Rule 3. The thing averred must be consistent with the record.

Allegans; *Kingston's*. See REPUGNANCY. *Avon*; *Munday*; *Wright*. The test of an

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adjudication is the identical evidence. Taylor v. Castle.

Rule 4. Estoppels are odious, and must be certain to every intent.

Kingston: 76; Lea: 30; Langmead; Aspden; Bliss, Pl. 364; Bernio, 129 Cal. 232, 79 Am. St. 118. *Degrees of certainty.* J'Anson: 91; Smith, Lead. Cas.; Dovaston: 217; § 4, Hughes' Proc.; 69 L. R. A. 483.

Ambiguity or uncertainty defeats a plea. Kingston: 76; Lea: 30; Langmead; Pack- et Co.; Aspden. See CERTAINTY; ALTERNATIVE PLEADINGS. Consequently the rule is, pleadings must be certain. Repugnant pleadings are void. Pain: 107; *Fabula*, etc. And, as already stated, the founda- tions of a judgment must appear with certainty. Russell: 27.

Rule 5. Allegations must be direct and certain, and not by way of supposal.

Kingston: 76; Munday: 79; Green: 90; Mauldin, *supra*. Pleadings must not be by way of recital, but must be positive in form. And. Steph. Pl. 205; Bliss, Pl. 364. The identity of the subject-matter depends upon the pleading. 1 Gr. Ev. 63; Bristow: 135; Perry: 136a; Garland: 60; cited, 195 U. S. 432. What ought to be of record should be proved thereby. *Alternative pleadings are void.* Pain: 107; *Fabula*, etc. Argumentative pleadings good after verdict, but not to prove a fact. See *Id.*; Outram: 25. *Contra*, Supply Ditch Co. (strict, Colo.).

Rule 6. The allegations must be traversable.

Dovaston: 217; Garland: 60; King- ston: 76; Hitchcock: 12; Lea: 30; J'An- son: 91. *Allegations and issues a neces- sity.* Kingston: 76; Hitchcock: 12; Bris- tow: 135; Munday: 79; Windsor: 1; Rushton: 5; Wright: 23; Sache: cases; Draper; Ruchman; Audi; *De non; Fru- stra probatur.*

Acts in pais cannot supply a record. Crain; Kingston: 76; Borkenhagen: 81; J'Anson: 91. What ought to be of record must be proved by record, and by the right record. Harrison, *supra*; *Salus*, etc.; *Expressio uni- us; Actore*, etc.; v. 16, ch. 25, Acts of the Apostles; Sto. Pl. 10. Allegations are re- quired by due process of law. Murray: 219; Cruikshank. In those states that waive pleadings and records, the above rules are not available, and there awaits the formation of new rules, and theories of the various estoppels. See THEORY.

Rule 7. An estoppel against an estop- pel sets the whole matter at large.

Repugnancy will destroy a pleading or an estoppel. Kingston: 76; Dovaston: 217; Moynahan (strict rule, Colo.). See ALTERNATIVE PLEADINGS; REPUGNANCY; Dickson: 34; Kingston: 76; *Allegans con- traria*.

Rule 8. Estoppels must be mutual.

Kingston's Case; *Res inter alios*, etc. The law of estoppel is of equitable origin, and one of the maxims of equity is: Mu- tuality is equity. One is not bound un- less the other is. This rule is analogous to the principle in Cooke v. Oxley: 321 (both sides must be bound by contract, or neither).

Rule 9. There is no estoppel where an interest passes.

Kingston's Case: 76, rule

Rule 10. The judgment must have been on the merits.**Res Adjudicata.—**

Kingston: 76; Graham, 224 Ill. 300, 7 L. R. A. (N. S.) 609, n.; 23 Cyc. 1055- 1611; Langmead; Aspden; Greeley; Van Fleet, Col. Att.; De Loach, 65 Ark. 467, 67 Am. St. 942, n.; 1 Freem. Judg. 256; Blair: 170. Dismissal of bills in equity. Langmead; Harvey: 32; Sto. Pl. 791, 793. Cf. Rensberger.

It must be averred that the trial was on the merits. Greeley. Also that it was final, and unappealed from and unreversed, for every presumption is against a pleader.

Judgment on demurrer: when final effect. Bissell: 42. Note, 62 Am. St. 609, Sto. Pl. 791-794.

Merits: initial of merits depends on a suffi- cient pleading. The best evidence is re- quired. Iverson: 46; cases. Acts in pais cannot supply a record, *supra*; *Quod ab initio*. Without a record to evince, there are no merits. He who cannot allege nor deny, and who does not respect "what ought to be of record must be proved by record," has no merits in judicial proce- dure. See MAXIMS; *Coram judice*; Dova- ston: 217; *De non apparentibus*; JUDICIAL NOTICE.

Sham, false and fictitious pleadings are with- out merit. Ex dolo malo. See *Coram judice*; S. v. Baughman: 268; Bro. Max. 329, n., 342; *Fabula non iudicium*; Won- derly: 102; Windsor: 1. Cf. Rensberger. The maxim of the law is, "without truth we can do nothing."

Rule 11. Judgments must be final.

Kingston: 76; Langmead; Blair: 170. Interlocutory orders are not final. King- ston; Langmead; Hazen, 70 Vt. 543, 67 Am. St. 680 (preliminary injunctions are not); 1 High, Injunc. 39, 40. *Contra*, Breeze (citing the dicta, for estoppel of record matter). *What is a final judgment.* See APPELLATE PROCEDURE; Kingston; Greeley; Sto. Pl. 791-794. Motions in practice not conclusive. Chichester; Blair, 58 Kan. 97, 62 Am. St. 606, n.; Bennett, 39 Mo. 152, 90 Am. Dec. 457; Bonesteel: 151; Freem. Judg. 320. *The judgment must be final on the merits, in full force and effect; and all these facts must appear from positive allegations.*

Rule 12. Due process of law and its elements must be present.

Windsor: 1: cases; Fayerweather; Kingston: 76; Munday: 79; Greeley; Audi, etc; Bloom: 266; notes, 2 Am. St. 609; Borden: 267.

A disinterested judge is essential for a valid judgment. Dimes: 176; Oakley: 222; stated, Newcome, 58 Tex. 141, 44 Am. Rep. 604. See *Coram judice*; MANDATORY RECORD; Audi, etc.

Rule 13. The record must be fairly construed.

Fayerweather: cases; Borden: 267; Kingston: 76; Langmead; Sto. Pl. 791- 794; Barrs.

Record must show what was before the court. *Expressio uni- us*, 1 Gr. Ev. 63, 2 id. 7, 3 id. 10; 180 U. S. 28, 471, 533; 195 U. S. 276.

Evidence alunde is sometimes admissible to explain issues. Fayerweather; Kingston: 76; Cromwell: 26; Bristow: 135; Gardner, sub Outram: 25; De Loach Co., 65 Ark. 467, 67 Am. St. 942; Russell: 27; Hersch- bach, 207 Ill. 517, 99 Am. St. 233, n. (subject-matter in trespass suit may be shown). But it must be consistent with the record. Mondel: 77; Fayerweather.

Bar cannot be avoided by changing the form of action. Harvey: 32. See impor- tant limitations in Barrs; Bro. Max. 341.

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99 (109 E. C. L. R.), 10 Jur. (N. S.) 366, 11 W. R. 964, 8 L. T. (N. S.) 577, 33 L. J. C. P. 46; 2 Van Fleet, For. Adj. 685; Freem. Judg. 223; 1 Herm. Estop.; 2 Sm. L. C. 837; 11 Rul. Cas. 10 (proceedings must be *Coram judice*).

Packet Co. v. Sickles (1860), 24 How. 333, 16 L. ed. 650; 1 Herm. Estop. 252, 2 Van Fleet, For. Adj. 431; Wells, Res Adj. 3, 224, 301, Bigl. Estop. 8; stated in *Cromwell*: 26; 180 U. S. 480, n.: cases; 195 U. S. 306.

R. v. Duncan; *P. v. Corning*; *C. v. Cummings*, sub *S. v. Croteau*: 271 (the state can have no review in criminal cases—former jeopardy); 195 U. S. 133 (citing *P. v. Corning*).

Wheaton v. Olds; *Marriot* (recovery at law ends litigation); *Perez*: 2e; *Nemo debet bis vexari*, etc.). See *Rensberger* (Colo.).

Issues of Res adjudicata are tried first. Sto. Eq. Pl. 700, 743. *Rensberger*.

In equity a reference may be made to a master. Sto. Pl. 700, 743; Beach, Eq. Pl. 309. Should be separately tried and determined, and of course before the matter it is sought to foreclose by the defense of *Res adjudicata*. 2 Bish. Crim. Proc. 751, 812; Whart. Crim. Pl. & Prac. 486; 9 Encyc. Pl. & Prac. 618; 1 Beach, Eq. Prac. 310; Kepner v. U. S. (1904), 195 U. S. 100-137 (the guaranty is against a second trial). *Lex neminem cogit ad vana*. Generally: See JUDGMENTS; *Kingston's Case*: 76; and other cases above cited; Title JUDGMENT, 16 Cyc.

RESCISSION OF CONTRACTS: *Whitworth*; *Binghampton Co.*, 68 Ark. 299, 82 Am. St. 296, n.; Whart. Confs. 282, 293; 2 Warv. Vendors, 825-872 (rescission); 1 Page, Confs. 139-141.

Must be prompt. *Auerbach*, 23 Utah, 105, 90 Am. St. 685, n.; *Ward*, 192 U. S. 168 (laches will estop). Where vendor warrants title. *Ferry*, 126 Ala. 162, 85 Am. St. 17, n.

Party deceived may rescind contract, and so when the party is unable to perform. Contracts induced by fraud are voidable. Election must be in a reasonable time. § 115, *Hughes' Confs.* Party rescinding must do equity. Rescission not granted when by complainant's laches other party is exposed to loss. Party rescinding should give notice. Ratification may be by conduct. Mere lapse of time does not estop. Election is final and must be signified. Rescission cannot be granted to grant rights of third parties. Party without title cannot pass title. Rescission may be granted on failure of part performance. Rescission for mistake. See *MISTAKE*. *Shapiro*, 192 U. S. 232, 242; cases. Return of goods required. *Easton v. Chapman*, 140 Ala. 440, 103 Am. St. 58, n.

Generally: *Warv. Vendors*; 2 Bouv. 901-902; And. Dic.; *Cutter*: 308; Whart. Confs. 282-293; 1 Beach, 789-849; Bish. 671-691; *Hughes, Confs.*; 2 Mech. Sales, 801-1059. See REFORMATION; RATIFICATION; *MISTAKE*; *MISREPRESENTATION*; *Pasley*: 375; *Schuchardt*; *EQUITY JURISPRUDENCE*.

RESCUE OF DISTRAINED PROPERTY: *McClain, C. L.* 52; *FORCIBLE TRESPASS*. *From jail*. *McClain, C. L.* 930-936.

RES EST MISERA UBI JUS EST *vagum et incertum*: It is a miserable state of things where the law is vague and uncertain. 2 Salk. 512. See *Stare Decisis*;

Res Est Misera.—

Stability. Si a jure discedas vagus, etc. Ubi jus incertum, ibi jus nullum: Frustra feruntur leges, etc. 1 Kent, 520. See GOVERNMENT.

Cited, § 8, *Hughes' Proc.*: § 76, Gr. & Rud. **RES GESTÆ:** *P. v. Vernon* (1868), 35 Cal. 49, 95 Am. Dec. 45-79, ext. n., 1 Gr. Ev. 108; 3 Wigm. 1768-1797; *Snowden v. U. S.* (1893), 2 Ap. D. C. 89, 9 Am. Cr. R. 449-454, n. (liberally applied in rape). See *Expressio eorum* where *Lord George Gordon* and *Redingfield* cases are cited; 11 Rul. Cas. 281-303, n.: cases; 16 Cyc. 1148; 2 Bouv. 897, And. Dic.; *McClain, C. L.* 411-415; *Wigm. Ev.* 218, 1745-1797, 1 Ell. Ev. 536-567. §§ 207, 334, 338, 344, *Hughes' Proc.*: §§ 68, 272, Gr. & Rud.

Intention in will; only *res gestæ* facts admissible to show. *Throckmorton*, 180 U. S. 552, 591; *contra* cases. *Trailing with bloodhounds*; *when admissible*. *Pedigo*, 103 Ky. 41, 82 Am. St. 566; *Campbell v. S.* (1901), 133 Ala. 81, 91 Am. St. 17, n.

RES INTER ALIOS ACTA ALTERI *nocere non debet*: Things done between strangers ought not to injure those who are not parties to them; or, a transaction between two ought not to operate to the disadvantage of a third. *Bro. Max.* 953-967; *Kingston*: 76; *Price*: 213f; *Higham*: 213c; *P. v. Campbell*; *U. S. v. Gooding*: 202; *Hendrick*: 319; *Whitcomb v. Whiting*; *Rees*: 334d; 2 Bouv. 898; And. Dic.; *Bailey, Jurisdic.* 232-259; 1 Gr. Ev. 278; *Ans. Confs.* 209; *Ell. Ev.* 159-161. See *Res Adjudicata*. Cited, *Hughes, Confs.*; 3 Wigm. Ev. 1975-2346.

Max. No. 37, §§ 334-342, *Hughes' Proc.*: §§ 60, 96, 191, 203, 271, 272, 278, 292-294, Gr. & Rud. Cited, §§ 6, 25, 44, 128, 169, 169a, 175, 305, 341, *Hughes' Proc.*

Two cannot contract for a third. *Bro. Max.* 697. *Abel*: 334; *Ans. Confs.* 209; *Non hæc in fœdera veni; Id quod nostrum; Quod ab initio*. See *WAIVER*.

Evidence; intent; collateral facts: when they may be shown to prove intent. *Strong v. S.*: 213a. See *Actus non facit reum*; *R. v. Wylie*; *Defrese*; *R. v. Ellis*: 213b; *Bristow*: 135. See *SYSTEM*.

System; is admissible to prove intent. Res inter; *R. v. Francis*; *R. v. Carter*; *C. v. Eastman*: 22; 1 Wh. Ev. 20-46; *Strong v. S.*: 213a; *P. v. Molineux*.

Collateral facts; are often admissible to prove the principal fact in issue. Strong: 213a; *R. v. Wylie*; *R. v. Ellis*; *Moore*, 150 U. S. 57; *R. v. Francis*; 1 Bish. Cr. Proc. 1120-1129; 2 *id.* 8 (arson). Order of proof in the reasonable discretion of the court. *Sub Bonnell*: 185; *Ell. Ev.* 130. Assault and battery; previous altercation. *Hannabalsen*, 116 Ia. 457, 93 Am. St. 250.

One transaction may include distinct acts or takings, and be separated by intervals of time (R. v. Ellis), e. g., the stealing of gas and consuming it. R. v. Firth (1869), *Law Rep.* 1 C. C. 177; stated note, *R. v. Ellis, B. & H.*: cited, 2 Bish. C. L. 798; 7 Crim. Law Mag. 711-723; *C. v. Partidge*: 190 (possession of stolen goods); *Res ipsa loquitur*.

Splitting crimes, not permissible. 2 Van Fleet, For. Adj. 595-626; 7 Crim. Law Mag. 714, 715; *Bendernagle*; notes, 58 Am. Dec. 539; *S. v. Warren*, 77 Md. 121, 39 Am. St. 401, n.; *S. v. Emery*, 68 Vt. 109, 54 Am. St. 878, n. See *Res adjudicata*.

Several felonies parts of one transaction; one as evidence to show the character of another. "The evidence must correspond

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with the allegations and be confined to the point in issue," has exceptions in counterfeiting, poisoning cases, etc. Strong v. S.: 213a; R. v. Wylle; *Res inter alios*. See SYSTEM; 1 Whart. Ev. 20-45. R. v. Francis (1874), L. R. 2 C. C. R. 128, 12 Cox, C. C. 612, 2 Green, Crim. Rep. 24, 1 Best, Ev. 255, 8 Rul. Cas. 85, 2 Bish. C. L. 488, 1 Gr. Ev. 53.

F. made repeated efforts to get advancements upon a ring that he persistently represented to be a diamond ring. A succession of jewelers to whom he applied had told him that it was not a diamond, but he gave no heed to this information, and finally got a loan upon the ring, upon his representations that it was a diamond. For this he was indicted. To show guilty knowledge, what had formerly been told him was admissible, although they were distinct transactions. R. v. Wheatley: 19; C. v. Coe, 115 Mass. 481.

Evidence; admissions; books of account, entries in. Declarations of deceased persons in the course of business, admissible in evidence. Price; Higham: 213a-213g; *Res inter alios*; S. v. Bacon; 1 Gr. Ev. 114-120; Mahaska: 213d (excellent case), stating Nichols and Higham: 213c; Thayer, Ev. 580-588; Drayton: 213e.

Books of account. Bouv.; And. Dic.; Smith, 163 N. Y. 168, 52 L. R. A. 545-610, ext. n. (books of account in one's own favor); Price: 213f. Issues in one case to prove facts in another. Cromwell: 26. In criminal case to prove facts in civil. Wagner: 290.

RES INTER ALIOS JUDICATAE NUL- lum alius prejudicium facit: Matters adjudged in a cause do not prejudice those who were not parties to it. Dig. 44, 2, 1. See PRIVACY; *Res inter alios*; *Res adjudicata*.

RES IPSA LOQUITUR: The thing speaks for itself. 2 Bouv. Dic.; Whart. Conts. 248; Cool. Torts, 476; Kearney: 211 (largest resume of this useful rule of evidence); Stearns, 184 Pa. 519, 39 L. R. A. 842, n.; Busw. Pers. Inj. 111a; Griffen, 166 N. Y. 188; 82 Am. St. 630, n. (Inference of negligence). Cited § 46, Hughes, Conts. See C. v. York: 197; C. v. Smith.

Cited, §§ 103, 208, 256, 263, 315, 384, Hughes' Proc.

Negligent injury; presumption of care. Wabash, 141 Fed. 932, 4 L. R. A. (N. S.), 352-358.

Probatis extremis præsuntur (or præsuntur) media; Ex uno discas omnes; Facta sunt potentiora verbis; Gibson, 177 Mass. 100, 52 L. R. A. 928 (limitations of its application); 101 Am. St. 390-394 (connecting lines). Acts speak as plainly as words. See WAIVER; NECESSARIES; RATIFICATION.

Presumption of malice from killing. C. v. York: 197; Neann v. S., 124 Ga. 760, 4 L. R. A. (N. S.) 934, n.

Intent inferred from act. Ellis; INTENT.

Fraud must appear from all the facts. 2 Chit. Conts. 1039. From the facts, relations and conditions, fraud is judged. Heaton, §§ 104, 105, Hughes, Conts.

Personal examination of a party or of his secretions. Cleveland, 151 Ind. 540, 68 Am. St. 238-252, ext. n. See PROPERT OF THE PERSON; PHYSICAL EXAMINATION; Lane v. R. R. (1899), 21 Wash. 119, 46 L. R. A. 153; cases; Austin R. R. v. Cluck; U. P. R. R. Co. v. Botsford, 141 U. S. 250 (power denied); Belt Co.,

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102 Ky. 551, 80 Am. St. 374, n. (court may direct); Konold, 21 Utah, 379, 81 Am. Dec. 693 (experiments may be made before a jury); S. v. Heght (1902), 117 Ia. 650, 94 Am. St. 323-347, ext. n. Power of court to compel one to submit to an examination. Wanek, 78 Minn. 98, 46 L. R. A. 448, n. View of premises by jury. P. v. Thorn (1898), 156 N. Y. 286, 42 L. R. A. 368-396, ext. n.; 3 Wigm. 1801-1803.

Contributory negligence. Must it be pleaded? One need not aver that he is without fault in an action of negligence; the burden of proving contributory negligence where this is not disclosed by the pleadings nor by the *res gestæ* facts upon proper cross-examination, is upon a defendant. Magee, 78 Cal. 430, 12 Am. St. 69, n.; Northern Pac. R. R., 163 U. S. 93, 41 L. ed. 82, n.; Thying, 156 Mass. 13, 22 Am. St. 425, n.; Shear, Neg. 43, 44; cases; Buesching, 73 Mo. 219, 38 Am. Rep. 503, n.; Georgia Pac. R. R., 92 Ala. 300, 4 Am. R. R. & Corp. Rep. 330-341; cases.

On principle, a plaintiff must aver such facts as raise a *prima facie* liability of the defendant, for a court will not presume a defendant a wrong doer simply because a plaintiff was injured. From the happening of a casualty, negligence is not presumed, without proof of more. There are two presumptions: that one is guardful of himself, and that one is innocent of a wrong until he is alleged and proven guilty. Now the former does not override the latter. *De non apparentibus*. And therefore a plaintiff must consider and deal with these presumptions, and he must at least make a *prima facie* case in both pleading and proofs.

Kearney: 211; Ross, 140 N. C. 115, 1 L. R. A. (N. S.) 298-503, ext. n., discussing Kearney and Byrne, McCully: 206, 1 Wh. Ev. 359, Whart. Neg. 420, 421 (the burden of proof is upon the plaintiff to allege and prove negligence; the law will not presume it); Losee; Huff, 46 Ohio 386, 15 Am. St. 613; Bonnell: 185; *Semper præsuntur pro negante*.

Where many articles are stolen, and it is proved that one stole a part, it is presumed that he stole all. C. v. Millard (1804), 1 Mass. 6; C. v. Montgomery, 11 Met. 534; R. v. Partridge: 190. See *Quod constat clare*, etc.; *Manifesta*, etc.; JUDICIAL NOTICE; *Non potest adduci*, etc. See also VIEWS OF PREMISES. *Fruits of crime; possession*. R. v. Partridge; U. S. v. King: 192.

Practical construction. 2 Whart. Conts. 653; Labatt, Master and Servant, 2302. *Introduction of bastard in evidence to prove parentage*. S. v. Harvey (1900), 112 Ia. 416, 52 L. R. A. 500-505, ext. n. Kelly v. S. (1901), 133 Ala. 195, 91 Am. St. 25, n. (is admissible).

Possession of a bill or note is prima facie evidence that it has been paid. Bonnell: 185; Cassem, 201 Ill. 208, 228, 94 Am. St. 173. See PREPONDERANCE OF EVIDENCE; Bonnell: 185; cases.

Res ipsa loquitur is a phrase that expresses a useful principle of circumstantial evidence. When that phrase was first used to express that principle is discussed with unusual diligence and erudition in 66 Cent. L. J. 386-388.

RESISTING AN OFFICER: 2 Bouv. 537 (Obstructing Process); And. Dic.; McClain, C. L. 921-929. Officer must have

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jurisdiction. See *USURPATION*; *Necessitas inducit*, etc. *Resisting felony by taking life*. See *SELF-DEFENSE*; *Aldrich v. Wright*; *Necessitas*.

RES JUDICATA FACIT EX ALBO nigrum, ex nigro album, ex curvo rectum, ex recto curvum: A thing adjudged makes white, black; black, white; the crooked, straight; the straight, crooked. 1 Bouv. Inst. 840, n. See *Res adjudicata*; *Kirven*; *Posito*; *Brittain*: 50.

RES PERIT DOMINO SUO: The destruction of the thing is the loss of its owner. Story, Bailm. 426; 2 Kent, 591; 12 Allen, 381, 14 id. 269; 9 Har. L. Rev. 106; c. q., if a vendee buys a thing and pays for it, and agrees to call for it next day, and it is destroyed, it is the buyer's loss. Tarling; Dame: 308c. See *Salus populi*, etc.

RESPONDEAT SUPERIOR: Let the principal answer, or respond, or be responsible. Bro. Max. 842-866; 76 Am. St. 375-428; M'Manus; *Hilliard v. Richardson*, cognate cases; *Limpus*; *Gregory*, sub. *Hilliard*; *Craker*; *Morier*; *Poulton*; *Salt Lake*; Busw. Pers. Inj. 37-50; Cornfoot, 385; Fitzsimmons, 384. See cases in Smith's and Am. Leading Cases; Sto. Ag. 452, Hufc. 243; Reinh. 3; Ror. Railroad Law, 820-842; 1 Add. Conts. 65; 2 Dill. Corp. 965-985; 1 Beach, Corp. 730-775; Jones, Corp. 161-171; Hardy, 47 U. S. Ap. 362, 37 L. R. A. 33-86, ext. n.; 17 Rul. Cas. 252-284; Palmer, 60 Vt. 427, 6 Am. St. 125-133, ext. n. Cited, §§ 306, 342, Hughes' Proc.; §§ 296, 302, Gr. & Rud.

Qui sentit commodum, etc. Hill v. Boston: cases, Hilliard. Officers liable for acts of deputies. See *OFFICERS*. Principal; when liable for agent's acts. R. v. Almon; P. v. Robey; 1 C. B. 578; 6 Mees. & W. 302; 10 Exch. 656; 76 Am. St. 375-428. *Respondere son souveraigne*: His superior or master shall answer. Articuli sup. Chart. c. 18.

RESPONSIO UNUS NON OMNINO auditor: The answer of one witness shall not be heard at all. 1 Gr. Ev. § 260. This is a maxim of the civil law, where everything must be proved by two witnesses. Two witnesses are required in treason, perjury and in some equitable actions. See *BURDEN OF PROOF*; Bonnell: 185.

RESTRAINT OF TRADE: Mitchel: 372; Mallan: 373; 2 Eddy, Combinations, 657-795 (able resume); 46 L. R. A. 122: cases; Ans. Conts. 49, 188, 189; 2 Bouv. Dic. 909-914. *Sealed contract for must nevertheless have a consideration*. Ans. Conts. 49, 188; Mallan: 373.

RETREATING TO THE WALL: Doctrines. Pond v. P.; U. S. v. Holmes; S. v. Gardner.

RETROACTIVE LAWS: See *Ex post facto*.

RETROSPECTIVE DECISIONS: See *Ex Post Facto Laws*; Bronson: 238. Opposed to stable procedure. Bronson: 238. See Windsor: 1; Dash: 237a; Bouv.; And. Dic.

RETURN: 2 Bouv. 919; And. Dic. Record must show a summons and its return to support jurisdiction when there is no appearance. Allbright, 126 Ga. 498, 115 Am. St. 108.

Sheriff's return and reports as evidence. 3 Wigm. 1664-1667.

RETURN OF PROCESS: Ald. Jud. Writs, 184-200. Return of process essential for officer's protection. Six Carpenters: 185. See *PROCESS*. May be impeached. Hauswirth: 51. §§ 13, 18, 70, Gr. & Rud. *Ex dolo malo*, etc. May be

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amended. Sub Owen. Must speak for itself; it cannot be altered or varied by evidence *aliunde*. Sanford v. Edwards. Officer, for justification, must set forth facts, not conclusions; "duly served," a conclusion, Lowe, 15 Cal. 296. See *Howard v. S.*: 166.

REUS EXCIPIENDO FIT ACTOR: The defendant by a plea becomes plaintiff. §§ 152, 320, Hughes' Proc.; Best, Ev. 294, § 252. The defendant by a plea is a plaintiff. *Ubi eadem*; *Favorabiliores*; *Actore non probante*; §§ 16, 98, 157, Hughes' Proc.

REVERSAL OF JUDGMENT: Its effect upon the parties, and interest depending upon the judgment. Cowdery, 139 Cal. 298, 96 Am. St. 115-146, ext. n.; Mach, 15 S. Dak. 432, 91 Am. St. 698, n. (mortgage nullified if resting thereon); Bridges, 106 Ky. 791, 90 Am. St. 267, n.; Di Nola v. Allison (1904), 143 Cal. 106, 65 L. R. A. 419 (effect on title to land); Florence Co., 138 Ala. 588, 110 Am. St. 50 (restitution under reversed judgment); Ure, 223 Ill. 454, 114 Am. St. 336, 2 Page, Conts. 814-815. See *MONEY HAD AND RECEIVED*.

REVERSION: Sale of; how regarded in equity. Ans. Conts. 169.

REVIEW: And. Dic. The common-law record—due process of law record—essential for. See *APPELLATE PROCEDURE*.

Bills of review. See *Id.*; § 29, Hughes, Conts.; 2 Cye, 524.

REVISED STATUTES OF THE United States: 2 Bouv. 921; And. Dic.

REVIVAL: 2 Bouv. Dic. 922; Hardwick, 115 Tenn. 393, 1 L. R. A. (N. S.) 1029, n.

REVIVOR: Bills of. Bouv. Dic.; Sto. Pl. 354. See *SUPPLEMENTARY*; 16 Cyc. 363-364. Forms of. Foster's Fed. Prac. 1309-1311.

REVOCATION: 2 Bouv. Dic. 922-925. Of proposal; when possible. Ans. Conts. 25-35; Jordan v. Norton.

REWARD: 2 Bouv. Dic. 925; Williams: 322; Shuey: 323. Giving information is not an arrest. McClaughy, 147 Fed. 463, 7 L. R. A. (N. S.) 216, n.

REX NON DEBET ESSE SUB HOMINE sed sub deo et lege: The king should not be under the authority of man, but of God and the law. Bro. Max. 47-50; Stockdale: 277.

REX NON POTEST PECCARE: The king (the Crown—State—Sovereignty—Government) can do no wrong. Bro. Max. 52-63; 1 Laws of England, 17; Hunsaker: 259; Belknap: 260; Hill v. Boston; 2 Rolle, 304; Jenk. Cent. Cases, 9, 308; 1 Sharz. Bl. 246; Hughes' Proc. § 309; §§ 63, 64, 67, 82, 295, Gr. & Rud.

In England this maxim is constitutional law, as it relates to the crown. In Illinois it is reaffirmed in the constitution, and in the fullest extent. Dulaney v. P., 96 Ill. 503. In Virginia it is extremely renounced. It is a very unsettled rule. U. S. v. Lee, 106 U. S. 196 (reason of the rule has ceased).

In England the petition of right (not established in America) allows a remedy. A statute allows the federal government to be sued *ex contractu* in the court of claims; but not *ex delicto*. *Expressio unius*; *Lonsdorf*.

The maxim affects procedure. Smoot's Case. It is discussed in relation to pleading and the parties. Dicey on Parties, 1-5.

Officers may be sued although government agents. Head v. Porter, 48 Fed. 481, 46

Rex Non Potest.—

Albany L. J. 205. See *Burdick Torts*, citing *Feather v. R.*, 6 B. & S. 257, 295; *Sanders v. Saxton*, 182 N. Y. 477, 108 Am. St. 826-844, ext. n.

Judicial immunity is a part of the maxim Rex non. Lange: 159; *Salus populi*. The judge claims for himself the same protection that is given the king; and this "judge made law" for judges has no exception or conflicting cases. There is no remedy for the wrongs of a superior judge. In *presentia majoris*.

Executive and ministerial officers have only limited protection. Savacool: 164.

Sovereignty not liable for wrongs. Houston v. S. (1898), 98 Wis. 481, 42 L. R. A. 29-73, ext. n.

Sovereignty has immunity within its rightful sphere, but its agencies, if sued, must plead a justification. JAnson: 91; Savacool: 164; Mostyn: 274. See *RES ADJUDICATA*.

REX NUNQUAM MORITUR: The king never dies. Bro. Max. 50.

REX CASES: See *REGINA*. R. stands for Rex or Regina (King or Queen); S. for State; C. for Commonwealth; P. for People; U. S. for United States.

If it is desired to know whether the title is one or the other, if we know the year of the decision we have only to see Table, *REGNAL YEARS*: BOUV. DIC.

From the *Grounds and Rudiments of Law*, the prescriptive constitution, arise the principles of the leading subjects of the law, which are mentioned in relation to their principles at §§ 262-303, *Grounds and Rudiments*, Vol. I. Criminal law is there classified as a leading subject. §§ 291-294, see also Foreword, Vol. II.

In England criminal law arises from the prescriptive constitution. The same principles govern in America. See §§ 45-72, *Grounds and Rudiments*.

Consistently with the foregoing views the principles and matter of the following cases should be well considered by the student. At § 291, *Grounds and Rudiments*, is found a definition of crime, which is also found in relation to *Conde* (R. v. Conde). The word "intentional" might well be inserted before "act," for it is construed in *S v. Bolden*: 216, Vol. III. This definition must be construed along with the principal maxim of the criminal law, namely, *Actus non facit reum nisi mens sit rea* (an act does not constitute a crime unless the intention was so). The *intention* (the intent) is a leading element and the reasoning relating to it must be understood.

The maxim last cited is one of the prescriptive constitution, and it admits of no exception, except in misdemeanors, partaking of a police nature. For *Salus populi suprema lex*

Rex Cases.—

there is an exception made in statutory crimes. *P. v. Robey*. The doctrine of coercion (*C. v. Neal*) is also an exception, where the husband is held liable for the misdemeanor of his wife committed in his presence.

Torpey.

The maxim *Qui sentit commodum sentire debet et onus* also influences the general rule in some cases. *R. v. Almon*; *Michael* (agents); *Manning* (accessory). The principal may be liable for the acts of the agent. *Almon*; *Respondet superior*.

From certain acts and relations the intent is inferred. *Res ipsa loquitur*; *Almon*; *Carter*; *Partidge*; *Conde*; *Hague*; *Hazelton* (bankers receiving deposits knowing they are bankrupt); *Latimer*; *Morby*; *Naylor*; *Orton*; *Partridge*; *Thurborn*.

One is presumed to intend the natural, direct and probable consequences of his act. *Qui primum peccat ille facit rixam*. This maxim is illustrated in the "Squib Case" and it applies in all relations. It applies in criminal law (*C. v. Selfridge*, Vol. II); *Morby*.

Every one is presumed to know the law. *Ignorantia legis neminem excusat* is well illustrated in *R. v. Esop* and *Levett's Case*.

The last two maxims mentioned and *Actus non facit reum* should be collectively considered. Also the maxims and cases cited in §§ 291-294, *Grounds and Rudiments*.

The doctrine of collateral and tacking intent deserves consideration. It means that if one starts out to commit one kind of crime, but instead commits another, he is liable for the latter. This doctrine is discussed in *Spies v. P.* (Anarchist Case), *R. v. Coney*, *R. v. Orton* and *R. v. Serne*. There are learned exceptions to this rule. *R. v. Latimer*; *R. v. Serne*. If one is attempting to commit a felony, and to prevent him a police officer shoots at the malefactor but misses him and kills a bystander the outlaw is not liable for murder. This was not the natural, direct and probable consequence of his act. *C. v. Moore*. The independent act of the policeman is too remote. In *jure non remota*. This maxim is illustrated in *R. v. Gardner*, *Collins*, *Goodhall*, *Latimer*, *Hull*, *Lowe*, *Longbottom*, *Manning*, *Morby* and *Pym*.

Nullus commodum capere potest de injuria sua propria finds limitations in *C. v. Moore* above cited. It is further illustrated in *R. v. Latimer*, *Longbottom*, *Morby*, *Pym*, *Scaife* and *Smith*.

Ignorantia legis neminem excusat is illustrated in its application in *R. v. Esop*, *Levett's Case* and *Prince*. This maxim should be considered with *Actus non facit reum*. The latter maxim often appears as a part of *Ignorantia legis*.

Actus non facit reum is cited in relation to *R. v. Allen*, *Almon*, *Barnard*, *Bishop*, *Conde*, *Hughes*, *Hull*, *Latimer*, *Manning*, *Orton*, *Serne*, *Smith*, *Thurborn*.

Rex Cases.—

Tolson, Twoose, Tyler and York.

Actio personalis is cited in relation to *R. v. Salmon*; *Allegans* in *Barnard*; *Caveat emptor* in *Bryan*; *Cessante ratione legis* in *York*; the *corpus delicti* must be proved in *Thurborn*; *De minimis* in *Hopley*; *De non apparentibus* in *Perrott*; *Expressio eorum* in *Barnard*; *Ex turpi causa* in *Clarence*; *In part* in *Burgess* and *Clarence*; *Lex non cogit ad impossibilia* in *Collins* and *Goodhall*; *Necessitas inducit privilegium* in *Dudley*, *Manning*, *Torpey* and *Tyler*; *Nemo tenetur in Doherty*; *Noscitur a sociis* in *Orton*; *Omne majus continet in se minus* in *Hopley* and *McGrath*; *Qui per alium* in *Morby*; *Res inter alios* in *Carter*, *Francis*, *Goodhall* and *Hopley*; *Res ipsa loquitur* in *Almon*, *Carter*, *Partridge*, *Conde*, *Hague*, *Hazelton* (banker receiving deposits), *Latimer*, *Morby*, *Naylor*, *Orton*, *Partridge* and *Thurborn*; *Salus populi suprema lex* in *Burgess*, *Clarence*, *Esop* and *Grant*; *Simplex commendatio non obligat* in *Bryan*; *Verba fortius in Mills*; *Volenti non fit injuria* in *Clarence*, *Longbottom*, *Morby* and *Scaife*.

The relation of contract to crime is discoverable in cases like *R. v. Conde*, *Hughes*, *Kilham*, *Middleton*, *Mills*, *Morby*, *Negus*, *Redman* and *Smith*.

The following topics in other parts of the work are also mentioned: *Indictments not amendable*: *R. v. Naylor*; *Assaults*: *Clarence*, *Latimer*; *Attempts*: *Collins*, *Goodhall*; *Bailments*: *Kilham* (*U. S. v. Holmes*); *Bigamy*: *Allen*, *Brown*; *Bills of Particulars*: *Esdaile*; *Coercion*: *Torpey*; *Compounding Offenses*: *Burgess*; *Corporations*: *Birmingham*, *Great North of England*; *Criminal Negligence*: *Hull*, *Longbottom*, *Lowe*; *Drunkards*: *Cruse*; *False Pretenses*: *Barnard*, *Bowerman*, *Bryan*, *Hazelton* (bank checks); *Jennison* (that one is eligible for marriage), *Kilham* (hiring a thing by means of), *Johnson*, *Martin*, *McGrath*, *Mills*, *Naylor*; *Homicide*: *R. v. Hopley* (by correction), *Hughes*, *Hull*, *Morby* (criminal negligence); *Husband and wife as witnesses*: *Inhabitants of All Saints*; *Infants, abandonment of*: *Falkingham*; *Criminal liability of*: *Owen*, *York*; *Larceny*: *Ashwell*, *De Banks* (by bailee), *Featherstone*, *Tolfree* (by adulterer), *Tolfree* (by partners), *Thurborn* (general resume), *Hazelton* (bankers), *Thurborn*, *Ashwell* (what is a taking), *Hands* (from automations), *McGrath* (robbery); *Pardons*: *Dudley*; *Suicide*: *Cruse*; *System*: *Ellis*; *Intent must be averred*: *Naylor*; *Criminal issues, how tried*: *Poole*; *Aiming at one and killing another*: *Serne*; *Former jeopardy*: *Solomons*; *Cooling time*: *Stedman*.

Crime is one of the leading subjects of the law. The matter of this subject is led to from maxims, cases and topic heads. To illustrate, see *Actus non facit reum nisi mens sit rea*; also *C. v. —* (cases); *P. v. —*; *S. v. —*; *U. S. v. —*; also **CRIME**; also **LARCENY**.

Many cases relating to crime will be found in **COMMONWEALTH**, the **PEOPLE**, the **STATE** and **UNITED STATES** cases. See **Foreword**, Vol. II. But the most considerable matter relating to crime will be found in relation to the *Rex v. —* (cases), which next follow:

R. v. ALLEN (1872). L. R. 1 C. C. R. 367, 12 Cox, C. C. 193: stated, *Mews' E. C. L.*

R. v. Allen.—

Bigamy. That a second marriage was invalid is no defense. Invalidity of first marriage is sometimes a defense. *C. v. Mash*; *R. v. Kay* (1887), 16 Cox, C. C. 292: stated, *R. v. Jones* (1883), 11 Q. B. D. 118; *Shaffer v. S.* Continuity; doctrines of *Carrotti v. S.*: 179; 1 Gr. Ev. 41. 42. *Bigamy*; *bona fide* belief in death of former consort is a defense. See *C. v. Mash*; *Actus non facit reum*.

R. v. ALMON (1770), 5 Burr, 2686, 20 St. Trials, 803-850, 1 L. C. C. (B. & H.) 145-157, n.: stated, 1 Bish. C. L. 219, *Mews' E. C. L.*: cited, 1 Bish. C. L. 219, Sto. Part. 166, Pars. 156, New. Def., 3 Crim. Def., Clark, Crim. Cas. 164, Sto. Ag. 452; *R. v. Mitchell*; 2 Gr. Ev. 170, 2 id. 64, 416. §§ 294, 298, 303, Gr. & Rud.

R. v. Almon stated: A. was a publisher, and one of Junius' letters having been published as printed at his shop, and it having been sold there, this was held *prima facie* sufficient to show his complicity (*P. v. Robey*); *Res ipsa loquitur*. A boy sold the libel at A.'s shop against his consent. The evidence did not sufficiently repel the *prima facie* case, and A. was convicted.

S. v. Mason (1894), 26 Or. 273, 26 L. R. A. 779-783, n.; *Smith*, 92 Wis. 133, 35 L. R. A. 620. Presumptions are evidence, and when in one's favor they cannot be disregarded. Intelligent courts will act upon them, and it is prejudicial error to disregard them. *Bonnell*: 186.

Agency. Liability of principal for criminal acts of agent. *M'Manus*. See *Respondent superior*; *Qui per alium facit*; *Thomson*: 342; *R. v. Michael*.

Criminal and penal liability for acts of co-partner, servant or agent. *R. v. Almon*; *P. v. Robey*; *Williams*, 115 Ala. 277, 41 L. R. A. 650, ext. n.

Principal liable for crimes of agent, if he participated in them. 1 Bish. C. L. 316; *C. v. Gillespie* (1822), 7 S. & R. (Fa.) 469, 477, 10 Am. Dec. 475-482, 3 Crim. Def. 190-287; *P. v. Robey*; *Kirkwood*. Procuring poison administered by the hand of an innocent agent renders the procurer liable, and not the agent. *R. v. Michael* (1840), 9 C. & P. 356 (38 E. C. L. R.), 2 M. C. C. 120: stated, 1 Bish. C. L. 651, 2 id. 740, 3 Gr. Ev. 15. An innocent agent is not responsible. *R. v. Michael*. Nor is the wholly innocent principal. *R. v. Almon*; 1 Bish. C. L. 219.

An agent has no implied authority to do criminal acts upon principal's account. *Shear*, Neg. 61, 69; *Poulton*; *Hipp v. S.*, sub *P. v. Robey*; *M'Manus*: cases.

Agent printing and selling unlawful publications in the employer's place of business is presumed to do it with the employer's knowledge and consent. *R. v. Almon*. The relation casts the *onus* on the employer.

R. v. ASHWELL (1885), 16 Q. B. D. 190, 16 Cox, C. C. 1, Chaplin, C. C. 220, Beale, C. C. 153, 7 Crim. Law Mag. 485; 8 Rul. Cas. 81: cited, 2 Bish. C. L. 812, *Mews' E. C. L.*

R. v. Ashwell stated: *Larceny by bailee*; sovereign mistaken for a shilling. Mutual mistake in giving or receiving a sovereign instead of a shilling, where recipient upon discovery of mistake immediately resolves to appropriate it, is larceny.

R. v. Ashwell; *R. v. Thurborn*; *Holbrook v. S.* (1894), 107 Ala. 154, 54 Am. St. 65, n.; *R. v. DeBanks* (1884), 13 Q.

R. v. Ashwell.—

B. Div. 29, 15 Cox, C. C. 450, 2 Bish. C. L. 342.

Receiving a chattel with contemporaneous intention to misappropriate is larceny. R. v. Ashwell; R. v. Charlewood (1786), Leach, C. C. 409, 3 R. R. 706, 8 Rul. Cas. 81, n. (subsequent acts to show intent); R. v. Riley (1853), Dearsly, C. C. 149.

R. v. Riley stated: *What is a taking.* Where a man, driving a flock of lambs from a field, drove with the flock a lamb belonging to another person, without knowing that he did so; and afterwards, when he discovered the fact, sold the lamb, denied having done so, and appropriated the proceeds to his own use, the court held that he was rightly convicted of larceny; for having in the first place driven away the lamb, the property of another, he committed a trespass, which, as soon as he resolved to dispose of the animal (the trespass continuing all along), became a felonious trespass.

R. v. BALDREY: See CONFESSIONS.

R. v. BARNARD (1837), 7 C. & P. 784 (32 E. C. L. R.); *stated*, Mews' E. C. L. 1214; *cited*, 2 Bish. C. L. 430, 438.

R. v. Barnard stated: *False pretenses by conduct; Res ipsa loquitur; estoppel; representations from conduct; things implied need not be mentioned; Expressio eorum, etc.* Obtaining credit by false assumption of position or condition is a false pretense. One obtaining credit of a boot-maker by inducing him to believe that he was an undergraduate of a college, by merely wearing its uniform, is a false pretense. P. v. Johnson.

Delivering a parcel by one personating the porter of a hotel by wearing its uniform and using such indicia of position, by these means obtaining credit, constitute a false pretense. R. v. Douglas (1808), 1 Camp. 212. Guests must be protected at an inn. Calye: 356. Inducing a credit for potatoes by representations of being a large dealer, evidenced by fabricated orders from which such would be implied, is sufficient to constitute a false pretense. R. v. Cooper (1877), 2 Q. B. D. 510. If a fabricated letter reasonably conveys to the mind the construction put upon it in the indictment, this is also sufficient. "The question in all these cases is, what was intended to be conveyed to the mind of the prosecutor by the acts, conduct, or silence of the prisoner? If a particular idea is intended to be conveyed to his mind, and is conveyed, and if it be false, the statute is complied with."

Language. Means of communication need not be oral nor in writing, but may be by any means employed to convey an idea, as by a wink, a nod, a picture, a sign, or object of any kind. Every one is presumed to intend the natural and probable consequences of his acts. Scott. (Squib Case); *Actus non facit reum.* The act itself does not make a man guilty unless his intentions were so. Bro. Max. 306. Neither in contract nor trespass law is one allowed to intend to convey a meaning, and then be heard to say that such meaning was not conveyed. *Allegans contraria; Posito.* Bro. Max. 169. Estoppel applies. Ewart on Estoppel.

R. v. BIRMINGHAM, ETC. R. R. (1842), 3 Q. B. 223, 3 Adol. & El. (N. S.) 223 (43 E. C. L. R.); 61 R. R. 207; 1 Lead. C. C.

R. v. Birmingham.—

158-176, n.; 9 C. & P. 478 (38 E. C. L. R.), 1 G. & D. 457, 2 id. 236, 3 Eng. Ry. & Canal Cases, 111, 3 Crim. Def. 119; Mews' E. C. L.: *cited*, 2 Dill. M. Corp. 931-933, 3 Gr. Ev. 9a, 5 Thomp. Corp. 6418. *Cited*, § 309, Hughes' Proc.; § 294, Gr. & Rud.

R. v. Birmingham R. R. stated: *Corporations; criminal liability; nonfeasance.* A corporation aggregate may be indicted by its corporate name for disobedience to an order of justice, requiring such corporation to execute works pursuant to a statute. And, if such indictment be preferred at assizes, or sessions, where parties cannot appear by attorneys, the proper course is to remove it into this court by *certiorari* and compel appearance by distress infinite.

R. v. Gt. North Eng. R. R.; C. v. Pulaske Co., 92 Ky. 197; S. v. Morris, etc. R. R. (1852), 23 N. J. Law, 360; Clark, Crim. Cas. On motion to quash such indictment as not maintainable against a corporation, the court refused to quash, but directed them to demur, reserving leave to them, if judgment should be given against them on the demurrer, to plead over. R. v. Birmingham.

Capacity of corporations for crime. 1 Bish. C. L. 417-424; 2 Cook, Stockh. 698; 3 Crim. Def. 1-19; 5 id. 1117-1133; Franklin Lodge. *May be indicted for nuisance.* R. v. Medley (1834), 6 C. & P. 439 (25 E. C. L. R.); *stated*, Wood, Nuis. 850, 1 Bish. C. L. 422. *Indictments of corporations.* R. v. Great North of Eng. R. R.; 6 Crim. Law Mag. 317-334; 5 Thomp. Corp. 6418-6444; 5 Crim. Def. 1117-1133. *Railway crimes and misdemeanors.* 10 Crim. Law Mag. 373-405.

R. v. BISHOP (1880), 5 Q. B. D. 259, 14 Cox, C. C. 404; *stated*, Mews' E. C. L., 8 Rul. Cas. 20; *cited*, 1 Bish. C. L. 311. *Lunatics; receiving of, in unregistered house, a statutory crime.* Lunatics are protected by legislation. *Ignorance of fact is no defense in statutory crimes.* C. v. Mash; P. v. Robey; *Actus non facit*; 1 Bish. C. L. 311.

R. v. BOWERMAN (1891), 1 Q. B. 112, 17 Cox, C. C. 151; *cited*, 1 Bish. C. L. 181, Mews' E. C. L.

R. v. Bowerman stated: *False pretences; inchoate; imperfect instruments.* One to whom incomplete negotiable instruments are given, and who afterwards perfects them, and wrongfully converts the proceeds, is indictable for a false pretense, within the meaning of 24 and 25 Vict., ch. 96, § 75.

R. v. BRAWN (1843), 1 C. & K. 144 (47 E. C. L. R.), Mews' E. C. L.

R. v. Brawn stated: Jane Colverte married Thomas Brawn, and afterward deserted him and married her deceased sister's husband, Webb, which was forbidden, and therefore void. She was indicted for bigamy, and was properly convicted. Webb was convicted as an accessory before the fact.

Bigamy. Second marriage may be void. Shafter v. S.

R. v. BRYAN (1857), Dears. & B. C. C. 265, 7 Cox, C. C. 312, 5 Crim. Def. 134, 40 Eng. Law & Eq.; *stated*, Mews' E. C. L.: *cited*, 2 Bish. C. L. 449-454; § 294, Gr. & Rud.

R. v. Bryan stated: *Simplex commendatio non obligat.* Puffing or praising goods is

R. v. Bryan.—

not indictable. 2 Benj. Sales, 930, 965. To induce a pawnbroker to loan money upon spoons, the prisoner represented them to be as good as "Elkington's A." *Held*, not indictable.

Barton v. P. (1890), 135 Ill. 405, 25 Am. St. 375-392, ext. n., 10 L. R. A. 302, ext. n.

Caveat emptor; *Simplex commendatio non obligat*; *warranty*. These are subjects extensively discussed in both the civil and criminal fields. Pasley: 375; Chandelor: 374; *Schuchardt*; *Caveat emptor*; R. v. Wheatley: 19; 1 Lead. Crim. Cas. (B. & H.) 1-34, ext. n.

Illustrations: Inducing one to buy a chain, representing affirmatively it was fifteen carat gold, when it was only six, and the seller knew it, is indictable. R. v. Ardley (1871), L. R. 1 C. C. R. 301; Chandelor: 374. So, affirmatively representing that a package contained good tea when in truth it was adulterated with sand, and the seller knew it, *held* indictable. R. v. Foster (1877), 2 Q. B. D. 301; R. v. Mills.

False pretenses; *requisite of indictment as to certainty*; *public and private frauds*; *deceits*; *indictments*; *limitations*. U. S. v. Watkins (1829), 3 Cranch, C. C. 441; 5 Crim. Def. 168-240; C. v. Schwartz (1892), 92 Ky. 510, 36 Am. St. 609, n.; Barton v. P., *supra*; Connor v. S. (1892), 29 Fla. 455, 30 Am. St. 126, n.

Inducing a clerk to deposit money as security for his fidelity by representations that the receiver was doing a large business, constitutes a crime. R. v. Crabb (1868), 11 Cox, C. C. 85. But grossly fraudulent representations as to value of a business, when the defendant was doing some business, is insufficient. R. v. Williamson (1869), 11 Cox, C. C. 328.

False pretenses, generally. R. v. Wheatley: 19; 2 Bish. C. L. 409-488; 5 Crim. Def. 134-392; Barton, *supra*; R. v. Martin (remoteness). *Deceit*; *misrepresentation*. Pasley: 375; Jenkins; *Caveat emptor*.

R. v. BUCKMASTER (1887), 20 Q. B. 132, 16 Cox, C. C. 339; *cited*, 2 Bish. C. L. 813; Mews' E. C. L.; 1 L. R. A. (N. S.) 863.

R. v. Buckmaster stated: *Larceny by trick*. A stakeholder at a horse race received money from the prosecutor, who had wagered on one of the races. The evidence showed the prisoner was a confidence man, and did not intend to return the money. Failing to do so, he was rightly convicted of larceny, and this independent of the question whether or not the identical coins were to be returned. (This case is closely allied to obtaining money under false pretenses.) R. v. Buckmaster; De-frese v. S.; R. v. Middleton; S. v. Bryan.

The prosecutor deposited the money with the prisoner, not intending to part with it, for he was to have his money back in a certain event; whereas the prisoner, when he received the money, never intended to give it back in any event. It is true that the prosecutor would have been satisfied if he had received back, not the identical coins which he had deposited, but other coins of equal value. But that does not show that he intended to part with his share of the money.

"Where the right of property as well as the

R. v. Buckmaster.—

possession is parted with by the delivery, there can be no larceny, however fraudulent may be the means by which the delivery of the goods is procured. See R. v. Solomons, in which the distinction is shown between larceny by trick and false pretenses."

An attorney, representing the cost in excess in order to appropriate that excess, is liable. C. v. Lannan (1891), 153 Mass. 287, 11 L. R. A. 450. Marrying a woman in order to get possession of her property to convert it, is larceny. See MARRIAGE.

R. v. BURGESS (1885), 16 Q. B. D. 141, 15 Cox, C. C. 779, 3 Crim. Def. 779; *cited*, 1 Bish. C. L. 711; Mews' E. C. L. R. v. Burgess stated: *Compounding crimes*; *elements of offense*. A written agreement not to prosecute for crime is an illegal compact and void.

Holman: 363; *In pari delicto*, etc.: In equal fault the possessor's case is the better. Collins v. Blantern; Keir; Jones v. Rice; C. v. Pease.

Silently witnessing a felony and not communicating it to officers of the law is misprision of felony. Sub Allen: 167. If, to knowledge, assent is added, such party becomes an accessory. Punishment for this offense is fine and imprisonment, and provisions against the commission of it by sheriffs, coroners and other officers are contained in 3 Edw. 1, ch. 9. See also Flower v. Sadler (1882), L. R. 10 Q. B. 572. *Salus populi*. *Compounding, generally*. C. v. Pease; *In pari*; 1 Bish. C. L. 709-715, n. *Misprision*. 1 Bish. C. L. 716-722.

R. v. CARTER (1884), 12 Q. B. Div. 522, 15 Cox, C. C. 448. Where one is in possession of stolen property, the accumulation of many thefts, such facts may be shown to prove system. *Res inter alios*, etc.; *Res ipsa loquitur*; R. v. Partridge: 190; P. v. Molinieux.

R. v. CLARENCE (1891), 22 Q. B. D. 23, 18 Cox, C. C. 511; Mews' E. C. L.

Assaults; *unlawfully and maliciously inflicting grievous bodily harm*; *communicating a venereal disease*. Marital intercourse with one's own wife and concealing from her the fact of having an infectious venereal disease is not actionable. See Hegarty; Volenti; S. v. Beck. *Contra*: R. v. Bennett (1866), 4 F. & F. 1105.

Ex turpi causa non oritur actio is applied. Courts afford no remedy in cases of immoral or illegal acts. *Salus populi suprema lex*; Holman: 363; *In pari delicto*; *Pacta*; *Jus publicum*. In U. S. v. Holmes, the crew owed the passengers a duty, and this was an element also in Craker. A husband owes a wife duty—protection, but he may treat her, as in R. v. Clarence, with impunity.

R. v. COLLINS (1864), Leigh & Cave, C. C. 471, 9 Cox, C. C. 497, 2 Lead. Crim. Cas. (B. & H.) 478, 3 Crim. Def. 701, 4 Am. Law Reg. (N. S.) 310, 3 Gr. Ev. 2, 215 Mews' E. C. L., 1 Bish. C. L. 741, 745, Bro. Max. 310, 314, 3 Crim. Def. 715, 738. *Cited*, § 294, Gr. & Rud.

Attempt. It is no crime to attempt an impossibility. R. v. Collins. *Lex non cogit ad impossibilia*. *Contra*: R. v. Goodhall.

Physical impossibility to commit a crime is a perfect defense. But one indicted under a statute for committing an unnatural offense with an animal can be convicted of attempting it upon a duck. A duck is an animal within the meaning of such a statute. R. v. Brown (1890), 24 Q. B. Div. 357, 16 Cox, C. C. 715, 1 Bish. C. L. 741,

R. v. Collins.—

2 *id.* 1192 (a plea of guilty will not aid an insufficient indictment).
Attempts. 2 Bish. Cr. Proc. 71-97; P. v. Moran (1890), 123 N. Y. 254, 20 Am. St. 732-748, ext. n., 10 L. R. A. 109, n.; P. v. Gardner (1894), 144 N. Y. 119, 43 Am. St. 741, 28 L. R. A. 609; P. v. Lee Kong (1892), 117 Cal. 626, n. (impossibility to commit a crime); C. v. Tolman (1880), 149 Mass. 229, 3 L. R. A. 747, n., 14 Am. St. 414, 3 Crim. Def. 640-750, 3 Encyc. Pl. & Pr. 97-103.

R. v. CONDE (1868), 10 Cox, C. C. 547; Mews' E. C. L. cited, 2 Bish. C. L. 600-686; §§ 291-294, Gr. & Rud.

R. v. Conde stated: Mrs. C., through a long period, denied her infant necessary sustenance, for lack of which he died. C. was guilty of manslaughter. A crime is the commission or omission of an act in violation of public law forbidding or commanding it.

Crimes. Omission to perform a duty is a crime. P. v. Pierson (1903), 176 N. Y. 201, 98 Am. St. 666, n.; R. v. Instant (1893), 1 Q. B. 450, 9 Am. Cr. R. 416; C. v. Ham (1892), 156 Mass. 485, 9 Am. Cr. R. 1-7, ext. n. (statute making it a crime to refuse to discharge marital and paternal duty); R. v. Waters; 71; R. v. Hughes; R. v. Smith; R. v. Lowe; R. v. Falkinham. See *Actus non facit reum*, etc. See also Preface, Hughes' Conts.; R. v. Killiam; U. S. v. Drew; McClain, C. L. 130, 237, n., 286, 357.

Statutes may make the omission of duty a crime; also prescribe that duty and the penalty for violating it, if in accord with the dictates of natural justice, the grounds and rudiments of law, the prescriptive constitution.

R. v. CONEY ET AL. (1882), L. R. 8 Q. B. D. 534, 15 Cox, C. C. 46, 3 Crim. Def. 789-818, 3 Crim. Law Mag. 647-680; *stated*, Mews' E. C. L. cited, 1 Bish. C. L. 258, 633, 2 *id.* 35, 2 Bish. Cr. Proc. 24. Cited, § 294, Gr. & Rud.

Presence at a prize-fight. Who are accomplices and principals; spectators, when liable; *Res ipsa loquitur*. All aiders, abettors and promoters of a prize-fight are criminally liable. R. v. Coney; R. v. Orton. *Principals and accessories.* Breeze v. S.; R. v. Manning.

R. v. CRUNDEN (1890), 2 Camp. 89, 11 R. R. 671; Mews' E. C. L. Cited, § 294, Gr. & Rud.

Public morals protected by legislation. R. v. Grey; R. v. Rice; 3 Am. Cr. R. 436. See **POLICE POWER**.

R. v. CRUSE (1838), 8 C. & P. 541 (34 E. C. L. R.), 2 Moo. C. C. 33; *stated*, 2 Crim. Def. 765, 19 L. R. A. 359; cited, 1 Bish. C. L., 2 Crim. Def., 3 Gr. Ev. 6, 7; Mews' E. C. L. *Drunkenness as an excuse for crime.* Mere drunkenness is no excuse for crime. U. S. v. Drew. Voluntary drunkenness affords no excuse for crime, as men must be taken to drown their faculties at their peril. U. S. v. Drew.

Delirium tremens from drunkenness is treated as insanity. If it produces such a degree of madness as to render the person incapable of distinguishing right from wrong at the time the offense is committed, he is relieved from criminal responsibility. R. v. Davis (1881), 14 Cox, C. C. 563. Though drunkenness is no excuse for crime, it may be taken into account by the jury when considering the motive or intent of a

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person acting under its influence. R. v. Gamlen (1858), 1 F. & F. 90.

Suicide; indictment for; attempt to commit excusable if drunkenness was profound. R. v. Moore (1852), 3 C. & K. 319, 13 Jur. 750; R. v. Doody (1854), 6 Cox, C. C. 463; *stated*, 2 Bish. C. L. 1187. *Suicide.* 2 Bish. C. L. 1183; 2 Best, Ev., pp. 726-754 (excellent resume). *Agreement to commit; survivor is guilty of murder.* R. v. Jessop (1887), 10 Crim. Law Mag. 862-888, n. *Persuading one to commit, is indictable.* 1 Bish. C. L. 510; C. v. Bowen (1816), 13 Mass. 356, 7 Am. Dec. 154, 155, n.; Blackburn v. S. (1872), 23 Ohio St. 146; Whart. Hom. 515; 2 Best, Ev. 7, 737. Agreement by two to die by suicide and one recovers, he is guilty of murder. 1 Bish. C. L. 652. Attempts to commit, not punishable as attempts to commit murder. R. v. Burgess (1862), L. & C. 259, 3 Crim. Def. 722. See **SUICIDE**.

R. v. CUMPTON (resisting arrest), sub *Necessitas inducit privilegium*, etc.

R. v. DE BANKS (1884), 13 Q. B. D. 29, 15 Cox, C. C. 450; cited, 2 Bish. C. L. 342.

R. v. De Banks stated: Larceny by bailee. A mare was delivered to D. to sell at a fair on a day when the prosecutor did not attend, but he sent his wife, who saw D. make the sale and receive the purchase-money. She demanded of D. the purchase price, offering to pay his expenses, which he refused to give, but absconded with the money without accounting for it. *Held*, he was guilty of larceny as bailee.

Much difficulty was expressed in this case, it being doubtful that the prisoner was bound to return the identical coin. R. v. Hassell (1861), 8 Cox, C. C. 491, Leigh & C. 58; *stated*, Jac. Fish. Dig.; cited, 2 Bish. C. L. 857. S. P. in R. v. Garrett (1860), 8 Cox, C. C. 368, 2 F. & F. 14.

A bailee must return the identical thing. Coggs; 350, *stated* and discussed in R. v. Hassell, *supra*. The position of the bailee, in contract, is defined before the crime is determined. And so it was in R. v. Hassell.

Larceny by bailee. C. v. James; R. v. Ashwell; R. v. Wynn; R. v. De Banks; Holbrook v. S. (1894), 107 Ala. 154, 54 Am. St. 65, n.

R. v. DOHERTY: See *Nemo tenetur*.

R. v. DUDLEY AND STEPHENS (1884), (The Mignonette Case), 14 Q. B. D. 273, 15 Cox, C. C. 624, 5 Am. Crim. Rep. 559, 108 Am. St. 725, Chaplin, C. C. 195, Beale, C. C. 109, 6 Crim. Law Mag. 95-102, 361, Clark, C. C. 133, 31 Alb. Law Jour. 36; *stated*, Kerr, Hom. 18, 195, Mews' E. C. L. 1501 (Criminal law—against the persons of individuals), 11 Jac. Fish. 17535, 19 L. R. A. 358, 3 Rul. Cas. 43; cited, 1 Bish. C. L. 348a, 923. Cited, §§ 46, 293, 294, Gr. & Rud.

R. v. Dudley stated: Homicide; necessity; self-defense. Killing an innocent person from appearances to save one's own life, is a question of fact for the jury. Two men, with a boy, shipwrecked, are not justified in killing the boy to save their lives. And if they do, it is murder. See *Necessitas inducit*; U. S. v. Holmes.

One cannot consent to his destruction or impairment for usefulness to the state. Id quod nostrum.

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Necessity and compulsion as a defense. 1 Bish. C. L. 346-355; *Actus Dei*; R. v. Crutchley (compulsion as a defense); R. v. Tyler. *Necessitas. Pardons*; are granted in England for erroneous convictions. R. v. Dudley. *Plea of*. 1 Bish. Cr. Proc. 832-848, Whart. Cr. Pl. & Pr. 521-537, Clark, Cr. Proc. 139. Pardon and amnesty. 6 Crim. Law Mag. 457-500. Legislative power to grant pardon or amnesty. Singleton v. S. (1896), 38 Fla. 297, 34 L. R. A. 261-266. May be conditional. Hawkins, *Ex parte* (1895), 61 Ark. 321, 54 Am. St. 209, n. *Pardons generally*. 1 Bish. C. L. 897-926a; Jones, Ind. Leg. Per., q. v.

R. v. EDWARDS (1877), 13 Cox, C. C. 384; *stated*, 2 Bish. C. L. 878, n.; *Mews' E. C. L.* (Criminal law—against property of individuals).

R. v. Edwards stated: Larceny, abandonment of property. Three pigs were bitten by a mad dog, and were shot and buried by their owner upon the premises. The prisoners, by stealth, exhumed and sold them for £10. *Held*, the owner's abandonment of them was not complete, and the prisoners were rightly convicted of larceny. What is buried in the soil is a part thereof, *e. g.*, a dead body.

To constitute larceny, the thing stolen must be of some value. Sub R. v. Thurborn. Although it may not be of the value of any coin known to the law. R. v. Morris (1840), 9 C. & P. 349 (38 E. C. L. R.); *cited*, 1 Bish. C. L. 224, 2 *id.* 767. Neither is it necessary that the property should be of value to third persons, if valuable to the owner. R. v. Clarke (1810), 2 Leach, 1036; *cited*, 2 Bish. C. L. 768, 828.

Larceny at common law, however, cannot be committed of things which are not the subject of property, as of real estate or as of a corpse; but it is a misdemeanor to remove a dead body without authority, however laudable may have been the motives of the defendant.

Of things in which no person has any determinate property, as treasure trove, wails, etc., till seized, it has been said that larceny cannot be committed; but it would seem that the true owner, though unknown, has still a property in them before seizure by the lord, unless there be circumstances to show an intended dereliction of the property. 2 East, P. C. 606. The same has been said of a wreck, but wrecking is now punishable as a felony by 24 & 25 Vict., c. 96, s. 64. Water supplied by a water company to a consumer, and standing in his pipes, may be the subject of larceny. *Ferens v. O'Brien* (1883), 15 Cox, C. C. 332; 11 Q. B. Div. 21; *cited*, 2 Bish. C. L. 765.

Abandonment of property. 2 Bish. C. L. 878; *Livermore v. White* (1883), 74 Me. 452; 43 Am. Rep. 600; *stated*, 2 Bish. C. L. 878, n. See *ABANDONMENT*.

R. v. ELLIS: L. C. 213b.

R. v. ESDALE (1860), 1 F. & F. 213. *BILLS OF PARTICULARS*: *Cryps*; McDonald.

R. v. ESOP (1836), 7 C. & P. 456 (32 E. C. L. R.), Beale, C. C. 67, 1 Bish. C. L. 294, 948, Bro. Max. 263, 1 Gr. Ev. 34, n. 3 *id.* 20, Clark, C. C. 123, Kerr, Fraud, 396; 4 *Mews' E. C. L.* 1103, 1111 (Criminal Law—Persons capable of committing offenses).

Cited, §§ 14, 20, 214a, *Hughes' Proc.*; §§ 46, 293, 294, 306, Gr. & Rud.

R. v. Esop stated: Ignorance of law is no

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defense. A native of Bagdad, Persia, on a ship at London, committed buggery (crime against nature). For that he was indicted, and being called upon to make defense, he pleaded that this was no crime in his far-away country, where it was a permissible custom, and that he did not know it was criminal in England. *Held*, that his plea was no defense; that ignorance of law is no defense. *Ignorantia legis.* Ellis v. U. S. But ignorance of fact will excuse. *Ignorantia facti excusat.* Civilly and criminally, one is presumed to know the law of the land, wherever he may be.

Elsewhere we observe of the variant views of arranging and classifying crimes. § 28, *Hughes' Conts.* It is easy to see that an odious crime in England, and so classified there, would not meet universal acceptance in all countries. On one side of a river an act may be quite innocent, even be regarded as a divine institution, while on the other it may be regarded as heinous. Such were the views of slavery prior to the civil war in America. And so it is in certain epochs as to treason.

Offenses against marital rights are extremely variant, *e. g.*, in Sparta was sought a hardy, well developed race; and therefore the wife was often yielded by the husband to become the mother of another man's children, in obedience to suggestion for the welfare of the state. This suggests antiquity's great respect for *Salus populi suprema lex*.

Acts highly culpable at one time or place may pass as innocent pastimes at another time or place. In one jurisdiction false and sham pleadings are a contempt, a crime (Graver: 103: cases); in other jurisdictions they are the custom of the country. Dicta, and parleys before some courts, confer jurisdiction of a subject-matter. See *THEORY OF THE CASE*. Therefore, it would seem, a classification of crimes can never be of universal acceptance, at any rate not before a universal definition of crime is acquiesced in.

Ignorantia facti is well illustrated in a lamentable accident that occurred in Virginia. Aroused from sleep by a disturbance among chickens, the owner went to his window shortly after midnight. He called to some person he saw moving about in the yard, and receiving no answer, fired his pistol. His aim was true. When he went out to capture the supposed thief, who dropped when the shot was fired, he found he had killed his wife.

It appears that she slept in an adjoining room, was awakened by the noise in the hen coop, and set forth to investigate. She did not hear her husband's call to halt. When he saw his wife's form in the darkness he supposed it was a thief. *Ignorantia facti*; *Levett's Case*.

R. v. FALKINGHAM (1870), L. R. 1 C. C. R. 222; *stated*, 4 *Mews' E. C. L.* 1462 (Criminal Law—Against the persons of individuals), 3 Jac. Fish. Dig. 3473.

Infants. Abandonment and exposure of an infant. Porter, sub *INFANTS*; R. v. Waters: 71; R. v. Conde.

R. v. FEATHERSTONE (1854), Dears. C. C. 369, 6 Cox, C. C. 376, 2 C. L. R. 774; 26 Eng. Law & Eq. 470, 2 Lead. C. C. 362, 2 Am. Law Reg. (O. S.) 695; *stated*, 4 *Mews' E. C. L.* 1340 (Criminal Law—against property of individuals); *cited*, 2 Bish. C. L. 822, 873, 874, 3 Gr. Ev.

R. v. Featherstone.—

158. *Larceny; adulterer*. Taking goods by delivery of adulteress is larceny. *R. v. Tolfree*.

R. v. FRANCIS: *Res inter alios acta*.

R. v. GARDNER (1856), *Dearsly & Bell*, C. C. 40, 36 Eng. Law & Eq. 640, 5 Crim. Def. 287, 7 Cox, C. C. 136, 2 Lead. C. C. (B. & H.) 163-172; 4 Mews' E. C. L. 1215 (Criminal Law).
Cited, § 346, Hughes' Proc.; §§ 293, 294, Gr. & Rud.

Remoteness; privacy. In jure non remota;
R. v. Pym. False pretenses; crime of.
R. v. Gardner; *Brown v. S.* (1897), 37 Tex. Cr. Rep. 104, 66 Am. St. 794, n. (checks; swindling by means of).

R. v. GIBSON: L. C. 272.

R. v. GIBSON: L. C. 149.

R. v. GOLDSMITH: L. C. 20.

R. v. GOODHALL (1845), 1 Den. C. C. 187, reported as *R. v. Goodall*, 2 Cox. C. C. 40, 4 Mews' E. C. L. 1444 (Criminal Law—against persons of individuals). *R. v. Goodchild* (1846), 2 Car. & Kir. 293, (61 E. C. L. R.), 2 Lead. C. C. (B. & H.) 446-451; *P. v. Gardner* (1894), 144 N. Y. 119, 125, 43 Am. St. 741, 744, 28 L. R. A. 699, 8 Ru. Cas. 52, 1 Bish. C. L. 741, 1 Gr. Ev. 214. *Attempt; abortion; indictment. It need not be averred that the woman was pregnant; the crime is complete from the attempt.* *R. v. Goodchild*; *S. v. Wilson* (1862), 30 Conn. 500, 1 Bish. C. L. 744, 809 (a pickpocket is guilty although there was no money in the pocket); *C. v. McDonald* (1850), 5 Cush. 385, 2 Lead. C. C. (B. & H.) 474-483, 1 Bish. C. L. 743. *C. intended to rob a store, and took an impression of the lock, and from it had a key made in furtherance of his designs, which were frustrated. Held: He was guilty of an attempt.* *Griffith v. S.* (1858), 28 Ga. 493; *Clark, C. C.* 169, 3 Gr. Ev. 163. One fired a pistol at a hole in the roof behind which he erroneously believed an officer to be. *Held: Guilty of an assault with intent to commit murder.* *P. v. Lee Kong* (1892), 95 Cal. 666, 29 Am. St. 165-169, n. *What constitutes acts too remote.* *U. S. v. Stephen* (1882), 12 Fed. Rep. 52; 3 Crim. Law Mag. 536, 3 Crim. Def. 647, 2 Bish. Cr. Proc. 71-97; *R. v. Francis*; *Res inter alios*.

R. v. GRANT (1834), 5 Barn. & Adol. 27 E. C. L. R., 23 N. & M. 105, 9 Ru. Cas. 186. *Cited*, §§ 313, Gr. & Rud. (Truth no defense in criminal libel).

R. v. GREAT NORTH OF ENGLAND
R. R. (1846), 9 Q. B. 315 (58 E. C. L. R.), 2 Cox, C. C. 70, 2 G. & D. 236, 9 C. & P. 478, 1 Lead. C. C. (B. & H.), 166-176, n., 3 Ry. Cas. 148, 7 Ru. Cas. 488; 4 Mews' E. C. L. 1109 (Crim. Law—Persons capable of committing offenses), 3 Jac. Fish. Dig. 3022; *cited*, 1 Bish. C. L. 420, 422, 424, 1 Add. Torts, 299, 3 Gr. Ev. 9a, 5 Thomp. Corp. 5418, 2 Kent, 290.

Corporations; misfeasance; appearance of. A corporation aggregate may be indicted for a misfeasance as well as a non-feasance. An incorporated railway company may be indicted for cutting through and obstructing a highway by works performed in a course not conformable to the powers conferred by act of parliament.

R. v. GREY (1864), 4 F. & F. 73, 4 Mews' E. C. L. 1694 (Criminal Law—Against public morals and police). Public morals protected. *R. v. Crunden*.

R. v. HAGUE (1864), 9 Cox, C. C. 412, 4 B. & S. 715 (116 E. C. L. R.), *stated*, Mews' E. C. L. 1442 (Criminal Law—Against property of individuals), 2 Jac. Fish. Dig. 2521.

R. v. Hague.—

R. v. Hague stated: Personation of voters; statutory crime; Res ipsa loquitur. One is guilty of personating a voter by the act of tendering his vote in silence, although, when asked if he is the person whose name is signed to the voting paper, he answers "No" and the vote is accordingly rejected. The thing speaks for itself.

Personation; cases relating to. A voter having two qualifications gave three separate votes. *Held* guilty and that his intent was immaterial. *Actus non facit.* See Bro. Max. 306; *P. v. Robey*.

Statutory crimes—Miscellaneous. Crimes against elections; counterfeiting; issuing money obligations payable in goods; denial of civil rights; purchasing soldiers' arms; enticing seamen to desert; retaining pension money; pension laws; embezzlement by officers; revenue law; offenses against the mail—postoffice. 4 Crim. Def. 109-285; cases.

R. v. HANDS (1887), 16 Cox, C. C. 188, 4 Mews' E. C. L. 1331 (Criminal Law—Against property of individuals).

R. v. Hands stated: Larceny; stealing from automats. Against the wall of a public passage was fixed what is known as an "automatic box," the property of a company. In each box was a slit of sufficient size to admit a penny piece, and in the center of one of its sides was a projecting button or knob. The box was so constructed that upon a penny piece being dropped into the slit, and the knob being pushed in, a cigarette would be ejected from the box onto a ledge which projected from it. Upon the box were the following inscriptions: "Only pennies, not half-pennies," "To obtain an Egyptian Beauty cigarette, place a penny in the box and push the knob as far as it will go." The prisoners went to the entrance of the passage, and one of them dropped into the slit in the box a brass disc, about the size and shape of a penny, and thereby obtained a cigarette, which he took to his confederates. The court of crown cases reserved *held* that the prisoners were guilty of larceny.

The means by which the cigarette was made to come out of the box were fraudulent, and the cigarette so made to come out was appropriated. There was undoubtedly a larceny committed. The case was the first of its kind. But there was no difficulty about it, as none of the ingredients necessary to constitute the crime of larceny were wanting. Fraudulently offering a "flash note" in payment, under pretense that it is a good banknote, is a false pretense within the statute. *R. v. Coulson* (1850), 1 Den. 592, 14 Jur. 557, 1 Eng. L. & Eq. 550, Temp. & M. 332. See other cases stated and cited, 2 Bish. C. L. 409-488. A banker receiving deposits knowing they will not be applied according to depositor's understanding is guilty of larceny. Notes, *R. v. Thurborn*.

R. v. HAZELTON (1874), L. R. 2 C. C. R. 184, 13 Cox, C. C.; *stated*, 4 Mews' E. C. L. 1231 (Criminal Law—Against property of individuals), 3 Jac. Fish. Dig. 3203; *R. v. Cooper*, 2 Q. B. Div. 512, 3 Crim. Law Rep. (Hawley), 461; *cited*, 2 Bish. C. L. 421. *Cited*, § 294, Gr. & Rud.

R. v. Hazelton.—

R. v. Hazelton stated: *False pretenses; bank checks; obtaining credit by false pretenses; Res ipsa loquitur.* One buying goods and representing that he intends to pay cash for them and for such payment gives checks on a bank where he has opened an account and closed it, except for a few shillings, and which has refused to pay his overdrafts, is guilty of false pretenses in obtaining credit by such means. Giving a check is not an implied representation that there is a sufficient deposit in the bank to satisfy it; but otherwise where the drawer represents he is buying for cash and upon that gives his check.

P. v. Barton (1890), 135 Ill. 405, 10 L. R. A. 302-308, ext. n. (cheating with bank checks); 2 Bish. C. L. 499; **Pierce v. P.** (1876), 81 Ill. 98, 5 Crim. Def. 318, n.; **Blackwell v. S.** (1899), 41 Tex. Cr. R. 104, 96 Am. St. 778 (must represent that the check will be cashed).

In order to constitute the offense, a man must make a pretense or representation as to existing facts; it must be false to his knowledge; money or goods must be obtained thereby, and with intent to defraud. A representation must depend upon what a man says and does and what his words and acts convey to the mind of another. It cannot depend upon the state of his own mind.

Bank checks. Obtaining credit by means of worthless bank checks when the drawer knew, or must have known, they would be dishonored, is a false pretense. If the drawer had no bank account with the drawee this in itself is sufficient. But otherwise if he honestly believed the checks would be honored.

R. v. Walne (1870), 11 Cox. C. C. 647. Acting rashly or foolishly without intention to defraud is insufficient. **R. v. Wheatley**: 19.

R. v. Hill (1851), 5 Cox. C. C. 259, 2 Den. C. C. 254, 2 Lead. C. C. 204-216, n. *Competency of witnesses; when child may testify.*

R. v. Hopley (1860), 2 F. & F. 202: stated, *Mews' E. C. L. (Criminal Law—Against the persons of individuals): cited*, 2 Bish. C. L. 886. *Homicide by correction.* Immoderate punishment of pupil by teacher, resulting in death, is murder. **R. v. Hopley**; 2 Bish. C. L. 686, 686, 878-891.

Study of cases; deductions from. This case is authority for the right of a teacher to punish a pupil, and for a parent to punish a child. *Omne majus continet in se minus.* It is also authority for several collateral points necessarily involved. 2 Bish. C. L. 683-690. Defense of members of a family and of wife's chastity must be limited to ocular facts, actually witnessed; and slaying must be in transport of passion. 2 Bish. C. L. 707.

Cooling time. Killing for revenge is murder. Half an hour is sufficient for cooling time. **R. v. Stedman**; 2 Bish. C. L. 697, 712.

Assaults; words are no assault. But these may act accumulatively and may be considered with other assaults: although taken singly either would pass as *De minimis*. *Res inter alios.* 2 Bish. C. L. 704; **Stephens v. Myers**.

Homicide by excessive or improper chastise-

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ment. S. v. Shaw (1902), 64 S. C. 566, 43 S. E. 14, 60 L. R. A. 801, ext. n., 92 Am. St. 817, n.

R. v. Hughes (1860), 1 Fos. & Fin. 726, 1 Dears. & Bell, 248: *cited*, 3 Gr. Ev. 129, 190, 198, 210; *Mews' E. C. L. (Criminal Law)*.

Cited, §§ 293, 294, Gr. & Rud.

R. v. Hughes stated: H. was employed to place a stage over a shaft within which men were working, to protect them from trucks loaded with coal falling into the shaft. He omitted his duty, and a truck fell into the shaft and killed several. He was indicted and adjudged as guilty as if he had pushed the truck into the shaft.

Crimes. *When there is a legal duty to perform, then act or omission is a crime.* **R. v. Smith**; **R. v. Conde**; **R. v. Lowe**; **R. v. Serne**. See *Actus non facit reum*. A crime consists in an act of commission or omission in violation of a public law. See **TORTS**.

Where no duty is owing there cannot be negligence. **Baltimore, etc. R. v. Cox** (1902), 66 Ohio, 276, 90 Am. St. 583, n., Missouri, K. & T. R. R. v. Wood; **U. P. R. v. Cappler**.

R. v. Hull (1864), (**R. v. Rampton**) Kel. 40, 1 Lead. Crim. Cas. (B. & H.) 50-59, 3 Crim. Def. 408: *cited*, 3 Gr. Ev. 129.

Cited, § 294, Gr. & Rud.

R. v. Hull stated: *Criminal negligence; manslaughter; misadventure* (**R. v. Lowe**). H., a workman on a roof, called out for others on the ground to stand clear, and all did except one Cameridge, who was struck and killed. *Held*, misadventure.

Rampton found a pistol, and he and another unloaded it, as they thought, but this was a mistake. For R. afterward pointed it at his wife, when it was discharged and killed her. *Held*, manslaughter. **R. v. Esop**; **Levett**.

R. v. INHABITANTS OF ALL SAINTS of Worcester (1817), 6 Maule & S. 194, 2 Lead. C. C. (B. & H.) 266-283, 1 Whart. Ev. 425, 432, 533, 1 Best, Ev. 126. *Husband and wife are witnesses for or against each other.* **Bro. Max**, 536, 1 Gr. Ev. 334. Wife can swear to contents of a trunk. 1 Wh. Ev. 423; **Illinois R. v. Taylor** (1860), 24 Ill. 323; **S. v. West**.

R. v. JENNISON (1862), 1 L. & C. 157, 9 Cox. C. C. 158: *stated*, *Mews' E. C. L. (Criminal law—against property of individuals): cited*, 2 Bish. C. L. 422-424.

R. v. Jennison stated: *False pretenses; when promissory.* A lover, representing himself an unmarried man, induced a woman to give him money upon the representation that he would marry her, and with the money establish a home for her. *Held*, guilty of a false pretense.

Promissory false pretenses are not indictable, for the pretense must be an existing fact. **R. v. Lee** (1863), 9 Cox. C. C. 304; **R. v. Wheatley**. *Deceit—False representations, when actionable.* **Pasley**: 375.

R. v. JOHNSON (1805), 7 East, 65, 2 Lead. C. C. (B. & H.) 432-445. *Indictable fraud and deceit.* **R. v. Wheatley**: 19; **R. v. Francis**.

R. v. KEYN: L.C. 171.

R. v. KILHAM (1870), L. R. 1 C. C. R. 261, 11 Cox. C. C. 561: *stated*, *Mews' E. C. L. (Criminal law)*, **Jac. Fish. Dig.**:

R. v. Kilham.—

cited, 2 Bish. C. L. 477.

R. v. Kilham stated: False pretenses; hiring by means of. Hiring and using a horse of a livery man, under vicarious pretenses, and afterwards returning the animal, is not obtaining property under false pretenses. Obtaining the loan of it another thing. Accordingly the law of bailments is involved.

R. v. LATIMER (1886), 17 Q. B. D. 359, 16 Cox, C. C. 70, Chaplin, C. C. 122, Mews' E. C. L. (Criminal law): *cited*, 1 Bish. C. L. 736.

R. v. Latimer stated: Assaults and wounding; aiming at one and wounding another; intent; tacking and collateral intent. If one is justified in acting and so injures an innocent third person, this excuses; but if otherwise, actor is at fault. *Nullus commodum*; *R. v. Martin* (1881), 8 Q. B. D. 54; *Barcus v. S.*, *sub R. v. Serne*.

Presumptions: intent inferred from act; Res ipsa loquitur; One is presumed to intend the natural, direct and probable consequences of his act. *Squib Case*; *C. v. York*.

Blocking a stairway, a means of egress from a theatre, to play a practical joke upon the audience, and thus causing a panic and consequent flight and collision with the obstruction, constitutes an unlawful and malicious grievous bodily harm. Malice against any particular person is not essential; it is sufficient that the act is dangerous, calculated to injure; just as in the case of a man who unlawfully fires a gun into a crowd, it is murder if one of the crowd is thereby killed. *R. v. Martin*; *Squib Case*.

Assaults; grievous bodily harm. *R. v. Clarence* (1891), 22 Q. B. D. 23; 16 Cox, C. C. 511, *ante*.

R. v. LEVETT: *Levett's Case*; *R. v. Esop*.

R. v. LEWIS: *L. C. 173*.

R. v. LONGBOTTOM (1849), 3 Cox, C. C. (Eng.) 439, 1 Lead. C. C. (B. & H.) 66-71, 7 Law Rep. (N. S.) 79, Clark, C. C.: *stated*, Mews' E. C. L., 3 Jac. Fish. Dig. 3434; *cited*, 1 Bish. C. L. 257, 3 Gr. Ev. 129; § 294, Gr. & Rud.

R. v. Longbottom stated: Criminal negligence; negligence of both parties; Volenti non fit injuria. Whenever death ensues from injuries inflicted by parties engaged in any illegal act, an indictment for manslaughter will lie, even though it appears that the deceased had materially contributed to his death by his own negligence. L. and another were intoxicated while furiously driving a rig at night. They mortally wounded, by running over him, one deaf from childhood, who had contracted an inveterate habit of walking at all hours in the middle of the road, against the dangers of which he had often been warned. This was negligence on his part, but the reckless driving of L., while intoxicated, "along a great thoroughfare leading to a large town, and thus being unable to avoid running over any pedestrian who may happen to be in the middle of the road, is that degree of negligence in the conduct of a horse and rig which amounts to an

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illegal act in the eye of the law; and if death ensues from injuries thus inflicted, the parties driving are guilty of manslaughter, even though considerable blame may be attributed to the deceased."

Volenti non fit injuria. Gross negligence supplies malice. *R. v. Longbottom*; *R. v. Lowe*. He who assents to his injury shall not be heard to complain of it, does not apply to criminal law as it does in civil actions. *Nullus commodum capere*. See *Hegarty v. Shine*.

The principle in *R. v. Longbottom* runs through the law of negligence. *Davies v. Mann*. See *R. v. Lowe*; *R. v. Solomon*; *R. v. Morby*; *S. v. Beck*. Crimes caused by carelessness. 1 Bish. C. L. 313-322. *Criminal negligence supplies malice.* *R. v. Longbottom*; *R. v. Hull*; *R. v. Lowe*; *C. v. Fitchburg R. R.* (1879), 120 Mass. 373, 5 Crim. Def. 1117, n. *Killing passenger.* *C. v. Fitchburg R. R.* (1879), 126 Mass. 472, 5 Crim. Def. 1126, n.

Unintentional homicide in the commission of an unlawful act. *Johnson v. S.* (1902), 66 Ohio, 59, 90 Am. St. 564-583, n.; *Spies v. P.*; *C. v. Moore* (important exception).

R. v. LOWE (1850), 4 Cox, C. C. (Eng.) 449, 3 Carr. & Kir. 123, 1 Lead. C. C. 60-65, ext. n.; 4 Mor. Min. Rep. 180: *stated*, Mews' E. C. L. (Criminal Law), 3 Jac. Fish. Dig. 3439, 3 L. R. A. 645: *cited*, 1 Bish. C. L. 217, 317, 2 *id.* 659; 1 Gr. Ev. 170.

Cited, § 348, Hughes' Proc.; § 294, Gr. & Rud.

R. v. Lowe stated: Criminal negligence; gross negligence supplies malice. An act of omission as well as of commission may be so criminal as to be the subject of indictment for manslaughter. Jones and Darkly hired L. to run a hoisting steam engine at a colliery. L. put one Stockley, a lad of fifteen years of age, in charge as engineer, over his remonstrances, and threatened the lad that he (L.) would make him work the engine. Tibbitts, a collier and employee, was being hoisted in the "skip," or basket, by the engine with S. in charge as engineer, who raised the basket too high, so that the basket struck the pulley above, and T., the workman, was thrown out and fell down the shaft, 510 feet deep, and was killed. L. was indicted for criminal negligence. *Held*, that in so leaving the engine in charge of the lad, Lowe was guilty of manslaughter.

Criminal negligence; omission and commission; gross negligence supplies malice. *R. v. Longbottom*; *R. v. Smith*; *R. v. Hughes*; *R. v. Conde*; *R. v. Hull*, *sub Stephens v. Myers*; *In fure*; *Actus non facit reum*; *R. v. Solomons*.

Crimes caused by carelessness and negligence. 1 Bish. C. L. 313-321, 3 Gr. Ev. 147; *Anderson v. S.* (1899), 27 Tex. App. 177, 3 L. R. A. 644, n.; *S. v. Dorsey* (1888), 118 Ind. 167 (negligently running a locomotive into a passenger car and killing a passenger therein is manslaughter). *Omission of duty as affecting question of intent.* 2 Crim. Def. 751-847; *R. v. Hughes*.

R. v. MANNING (1852), Dears. C. C. 21, 6 Cox, C. C. 86, Chaplin, C. C. 269; Mews' E. C. L. (Criminal Law): *cited*, 2 Bish. C. L. 824, 836, 1 Bish. Cr. Proc. 4, 10, 1 Am. Law Reg. (O. S.) 374, 2 Wh. Ev. 1256, 3 Wh. 7, 29, 44, 48, 55, 154;

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P. v. Bliven (1889), 112 N. Y. 79, 8 Am. St. 701.

R. v. Manning stated: Accessory before the fact. Aiding, assisting or abetting one in and about the commission of a felony constitutes one an "accessory before the fact."

Accessories, in general. Breese v. S.; 1 Bish. C. L. 660-708, 2 Bish. Cr. Proc. 1-15. *Coercion of wife presumed.* C. v. Neal; *Necessitas.*

R. v. MARTIN (1867), L. R. 1 C. C. R. 56, 10 Cox, C. C. 383; *stated*, Mews' E. C. L. (Criminal Law), 3 Jac. Fish. Dig. 3209.

R. v. Martin stated: In jure non remota causa sed proxima spectatur: In law, the immediate, not the remote, cause of any event is regarded. Inducing one to manufacture a thing and afterwards to deliver it by fraudulent artifices and deception is indictable. The fact that a thing is not in existence at the time of the pretense is immaterial. It is sufficient if there is a direct connection between the pretense and the delivery; but there must be a continuing pretense. P. v. Johnson; R. v. Naylor.

Remoteness. One obtaining lodging by personating a naval officer is not indictable. *Held*, too remote. R. v. Gardner; R. v. Fym.

Inducement of contract by fraud and delivery of property under the contract, held, too remote. R. v. Bryan, 2 F. & F. 567; R. v. Larnier (1880), 14 Cox, C. C. 497; R. v. Greathead (1878), 14 Cox, C. C. 108; R. v. Burton (1886), 16 Cox, C. C. 62.

R. v. McGRATH (1869), L. R. 1 C. C. R. 205, 11 Cox, C. C. 347; *stated*, Mews' E. C. L. 1335 (Criminal Law), Jac. Fish. : *cited*, 2 Bish. C. L. 807.

R. v. McGrath stated: Robbery; extortion by frightening; obtaining money under false pretenses. A spectator at an auction made no bid; yet, to extort money from her, those conducting the auction insisted she did, and refused to let her leave the room until she paid the money demanded. *Held*, larceny, but not robbery, as sufficient force was not shown.

S. v. McCune (1857), 5 R. I. 60, 70 Am. Dec. 176-191, *ext. n.* (elements of the crime): *cited*, 2 Bish. C. L. 1167, 1179; Crawford v. S. (1893), 90 Ga. 701, 35 Am. St. 242, *n.* (extorting a payment by violence).

In larceny goods may be obtained in various ways. The essence of the offense is knowingly to take the goods of another against his will. If by force, a robbery is committed. A robbery includes larceny. *Omne majus continet in se minus.* But force is not a necessary ingredient in larceny. It is sufficient to constitute larceny if the goods are obtained against the will of the owner.

Parting with goods from fright caused by persons with the *animus furandi* is larceny. The material ingredient is that the goods were obtained against the will of the owner. U. S. v. Jones (1813), 3 Wash. 216.

A traveling grinder, extorting an excessive price by menaces, is guilty of larceny. R. v. Lovell (1881), 8 Q. B. D. 185; *cited*, Bish. C. L.

Larceny; robbery. Sufficient intimidation

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must appear to constitute robbery. *See* R. v. Knewland, *etc.* (1796), 2 Leach, 721; *stated*, 4 Bl. Com. 241, 242; R. v. Francis (1735), 2 Strange, 1015; Beale, C. C. 192.

Threatening to charge one with sodomitical practices was held to be larceny. R. v. Donnally (1789), 1 Leach, 193. "The law considers the fear of losing character by such an imputation as equal to the fear of losing life itself, or of sustaining other personal injury." Things equal to the same thing are equal to each other. Robbery is larceny from the person by violence. *And*, Dic. 909. Anything taken by any degree of intimidation is sufficient. 4 Bl. Com. 243; *And*, Dic. Law, 910; 2 Bish. C. L. 1158-1165.

Robbery, generally. S. v. McCune; R. v. McGrath; 2 Bish. C. L. 1156-1182; Bish. Stat. Crimes, 517-531; 5 Crim. Def. 684-722, Clark, C. C. 408-416; 3 Gr. Ev. 223-236; 2 Bish. Cr. Proc. 1001-1008.

Piracy, generally. 2 Bish. C. L. 1057-1061; Jones, *Ind. Leg. Per., q. v.*; U. S. v. Palmer (1818), 3 Wheat. 710; 4 Crim. Def. 122, 1 Kent, 184-196.

R. v. MICHAEL (1840), 9 C. & P. 356 (38 E. C. L. R.), 2 M. C. C. 120; *stated*, Mews' E. C. L. (Criminal Law), 3 Jac. Fish. Dig. 3427; 1 Bish. C. L. 651, 2 *id.* 740, 3 Gr. Ev. 15.

R. v. Michael stated: M., the mother of a child, delivered its nurse a bottle of poison, but said it would be good for it. It so happened that the contents of the bottle were innocently administered and killed the child. However, the nurse was not guilty.

Agents; commission of crime by. Procuring poison to kill with, and allowing an innocent agent to administer it, makes the procurer, and not the agent, responsible. R. v. Michael; R. v. Stephens; R. v. Almon; S. v. Hipp; C. v. Gannett; P. v. Robey. *Agents in crime.* R. v. Almon.

R. v. MIDDLETON (1873), L. R. 2 C. C. R. 38; 12 Cox, C. C. 260, 417; 4 Eng. Rep. 536; Beale, C. C. 161; *stated*, Mews' E. C. L. 1327 (Criminal Law), 3 Jac. Fish. Dig. 3331; *cited*, 2 Bish. C. L. 855.

R. v. Middleton stated: M. had 11s. in bank. He undertook to draw 10s. of it, but by mistake he was given £3 16s. 10d. M. took it, intending to appropriate it. Held, guilty of larceny. The deliverer of money, who pays it under mistake as to amount, the receiver evincing an intention to appropriate it, and the facts showing such *animus furandi*, the latter is guilty of larceny. R. v. Middleton.

Inducing one by a trick or deception to deliver money to one who fraudulently appropriates it, constitutes larceny. R. v. Hollis (1883), 12 Q. B. D. 25, 15 Cox, C. C. 345; *cited*, 2 Bish. C. L. 812; S. v. Ryan.

R. v. MOLLIS (1843), 10 Clark & F. 534, 8 Eng. R. 844-982; Bro. Max. 507-509 (marriage depends on solemnization according to statute; *see* MARRIAGE), Mews' E. C. L. (Husband and wife), Yelverton v. Longworth, 4 Macq. Sc. App. Cas. 743, 745, 862, 893; Beamish, 9 H. Lds. Cas. 274, 11 Eng. Rep. 735.

Marriage is a contract which statutes often regulate. See MARRIAGE CONTRACTS. And its status may be inquired after and seen from many view-points, such as contracts here, and crimes there, and as estoppel elsewhere; as where one holds out a wom-

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an as his wife and so creates appearances upon which third persons act.

R. v. MILLS (1857), 26 L. J. M. C. 79, Dears. & B. 205, 7 Cox. C. C. 263: *stated*, Mews' E. C. L. 1214 (Criminal law), Jac. Fish. Dig.: *cited*, 2 Bish. C. L. 462.

R. v. Mills *stated*: *False pretenses. Deception essential and must be acted on.* P. v. Johnson. If prosecutor is not deceived by the tricks and artifices, there can be no conviction. One hired to bestow labor at so much per measure, and who augments this by fraudulent additions and charges for these, and all this is known by the payer, there can be no conviction. Ignorance of the falsity is the lacking ingredient. There must be deception and fraud practiced, and then acted on. **R. v. Bryan.**

But in such cases there may be an indictable attempt. **R. v. Roebuck** (1856), Dears. & B. 24. Assuming a false name in connection with getting possession of goods is not indictable, nor is the record sufficient unless it shows affirmatively that such assumption was the inducement. If it can be inferred that the goods were delivered before such representations were made, or that these were ineffectual, it will be done. **R. v. Jones** (1884), 15 Cox. C. C. 475. Every presumption against a pleader. Bro. Max. 602, citing **Hughes v. Done**, (1841), 1 Q. B. 299, 1 Adol. & Ell. N. S. (41 E. C. L. R.); **Dovaston**: 217; **Moore v. C.**: 21; *Verba fortius.*

R. v. MORBY (1882), 8 Q. B. D. 571, 15 Cox. C. C. 35, Clark. Mews' E. C. L. (Criminal law): *cited*, 2 Bish. C. L. 643.

R. v. Morby *stated*: *Homicide; murder; neglect of duty to provide a doctor, when a crime.* Disbelief in doctors by religious fanatics excuses, if one under their protection dies of a curable disease.

2 Bish. C. L. 643; **Parsons v. S.** (1852), 21 Ala. 300, 5 Crim. Def. 922 (erroneous treatment contributing, immaterial); **Bowen v. S.** (1873), 38 Tex. 482, 5 Crim. Def. 1085, n.; **R. v. Pym.**

Wounded person's neglect, causing death, is no defense. 2 Bish. C. L. 638; **R. v. Pym**; **Morgan v. S.** (1884), 16 Tex. Ap. 593, 5 Crim. Def. 926.

Neglect to supply nourishment (if wicked negligence) supplies criminal intent. **R. v. Nicholls** (1875), 13 Cox. C. C. 75; **Porter v. Powell**: 1 Bish. C. L. 557, 883; **R. v. Waters**: 71.

Omission of duty as affecting question of intent. 2 Crim. Def. 751-847. *Neglect of duty must not be too remote. In jure non remota.*

Husband and wife; relation of, exists if parties live together as such, in cases involving neglect of duty. *Res ipsa loquitur.*

R. v. NAYLOR (1865), L. R. 1 C. C. R. 4, 10 Cox. C. C. 149: *stated*, Mews' E. C. L. (Criminal law), Jac. Fish. Dig.: *cited*, 2 Bish. C. L. 471.

R. v. Naylor *stated*: *False pretense; intent to defraud; Res ipsa loquitur; intent inferred from acts.* One obtaining possession of carpets under pretense that another person wanted them, which representation was false, is guilty; and from such conduct the guilty intent may be inferred. **P. v. Johnson.**

Pleadings; "intent to defraud an essential allegation"; an omission of, not amendable. **R. v. James** (1872), 12 Cox. C. C. 127.

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No material allegation within the oath of the grand jury can be amended. A material amendment is an alteration, and the bill of the grand jury cannot be amended for obvious reasons. The division of state power is involved. The functions of a grand jury cannot be usurped and exercised by other functions or officials. *See* Bro. Max. 629.

R. v. NEGUS (1873), L. R. 2 C. C. R. 34; 1152, 12 Cox. C. C. 492, 4 Crim. Def. 892, 1 Crim. Law Rep. 150: *stated*, Mews' E. C. L. (Criminal Law), Jac. Fish. Dig.: *cited*, 2 Bish. C. L. 341-346.

R. v. Negus *stated*: *Embezzlement; clerk or servant; who is.* The test is, when the person charged is under the control and bound to obey the orders of his master, he may do so without being bound to devote his whole time to this service; but if bound to devote his whole time to it that would be very strong evidence of his being under control.

Calkins v. S. (1868), 18 Ohio St. 366, 98 Am. Dec. 121-174, ext. n.

Relevancy of evidence; distinct transactions; collateral acts. Evidence of other embezzlements than those charged in the indictment admitted to refute the probable defense of mistake. *See* **R. v. Richardson** (1861), 3 Cox. C. C. 448; **R. v. Proud** (1861), 9 Cox. C. C. 22; *Res inter alios*; **R. v. Ellis**: 2136; **Strong v. S.**: 213a.

Certainty of evidence essential. Corpus delicti (Matthews v. S.) must be clearly and definitely proved. Proof of a general deficiency, and not of specific sums, held not sufficient to support a conviction. **R. v. Negus.** *See* **R. v. Lloyd Jones** (1838), 8 C. & P. 288 (34 E. C. L. R.); **R. v. Chapman** (1843), 1 C. & K. 119; **R. v. Wolstenholme** (1869), 11 Cox. C. C. 313; **R. v. King** (1871), 12 Cox. C. C. 73.

It is essential that the accused occupy a fiduciary relation; that he receive property (money) in the course of his employment; that the property belonged to his principal; that he convert it with intent to steal and embezzle. *Id.* **Medley** (1866), 31 Cal. 112; **S. v. Turney** (1882), 81 Ind. 559, 3 Crim. Law Mag. 498-505, n. (that reception was illegal, is no defense). Distinguished from "larceny," in that the taker comes lawfully into possession of the property. **U. S. v. Lee** (1882), 12 Fed. 318; **S. v. Wingol** (1883), 39 Ind. 206, 4 Crim. Law Mag. 661-669, n.; **S. v. Homes.**

Details of the crime being statutory, the decisions are to be read with caution. 2 Bish. C. L. 231; *id.* 326-482, 2 Wh. C. L. 1905-1942, 2069-2162. In some states an injured party may be reimbursed for the injury, or take security therefor. **Johnson** 57 Wis. 262. Many states follow 24, 25 Vict. (1862), ch. 96 §§ 68-72. **R. S. U. S.** §§ 5467, 5486, 5496; **U. S. v. Cook** (1872), 17 Wall. 171.

Embezzlement generally. 2 Bish. C. L. 316-383, 4 Crim. Def. 892-904; **Calkins v. S.**, *supra*; 1 Bish. C. L. 567; 2 *id.* 318-383; **Grant v. S.** (1895), 55 Fla. 581, 43 Am. St. 263, n., 23 L. R. A. 723, 7 Encyc. Pl. & Pr. 410-459, 2 Bish. Cr. Proc. 814-843; **C. v. Ryan** (1892), 155 Mass. 523, Clark. C. C. 395-398, n.

R. v. O'BRIEN: L. C. 75.

R. v. ORTON: Presence at a prize fight. *Noscitur a sociis; Res ipsa loquitur*; **Vosburg v. Moak.** *See* *Actus non facit reum.*

R. v. OWEN (1830), 4 C. & P. 236 (19 E. C. L. R.), **Chaplin**, C. C. 137, 3 Crim. Def. 138: *stated*, 117 N. C. 708, 36 L. R. A.

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210, Mews' E. C. L. (Criminal Law), Jac. Fish. Dig.: *cited*, 1 Bish. C. L. 368, 1 Gr. Ev. 28, 3 *id.* 4.

R. v. Owen stated: Infancy as an excuse for crime. Infants under fourteen years must be proved to have intended the commission of crime. A child under seven years cannot be guilty of a crime, for it is conclusively presumed to be *doli incapax* (incapable of a criminal intent). 1 Bish. C. L. 368; 2 Best, Ev. 438. A boy under fourteen years of age is conclusively presumed to be incapable of committing a rape. *R. v. York; Godfrey v. S.*; 3 Gr. Ev. 4; 2 Best, Ev. 438; S. v. Yeargan, *sub R. v. York*.

R. v. OXFORD: L.C. 200.

R. v. PARTRIDGE: L.C. 190.

R. v. PERBOTT (1814), 2 Maule & S. 379-392, 15 R. R. 280, 8 Rul. Cas. 113-116, n.; Mews' E. C. L. 1239 (Criminal Law); S. P. Rushton: 5; Moore v. C.: 21; R. v. Goldsmith: 20; R. v. Wheatley: 19. *De non apparentibus*, etc.

R. v. POOLE (1733), Hardw. Temp. 28. Province of judge and jury a fundamental principle of the division of state power; essential for a constitutionalism. § 103, Hughes' Proc.

R. v. POYNTON (1862), L. & C. 247, 9 Cox, C. C. 249; *stated*, 4 Mews' E. C. L. (Criminal Law), Jac. Fish. Dig.: *cited*, 2 Bish. C. L. 855.

R. v. Poynton stated: Larceny; asportation. A letter carrier's duty was either to deliver or return to the postoffice letters intrusted to him. He failed to perform this duty relating to a letter containing money, and, when called to account, fabricated excuses. *Held*, he was rightly convicted of intending to steal the letter, and that the asportation was sufficient.

There must be not only a taking but also a carrying away, or "asportation," to constitute larceny. A bare removal, however, from the place in which the thief found the goods, though he does not make off with them, is sufficient. Thus, to remove a package from the head to the tail of a wagon, with a felonious intent to take it away, is a sufficient asportation to constitute a larceny; but merely to alter the position of the package on the spot where it lies is not. *R. v. Coslet* (1782), 1 Leach, C. C. 236; also *Cherry's Case* (1782), 1 Leach, C. C. 237, n.

Where a thief is not liable to carry off the goods because of their being attached by a string to the counter (2 East, P. C. 566), or to carry off a purse, because of some keys attached to the string of it getting entangled in the owner's pocket (*R. v. Wilkinson*, 1 Hale, 508) there was *held*, in these cases not to be an asportation, because there was no severance. In cases, however, where there is no asportation the prisoner may be indicted for an attempt to steal. It was *held*, in the case of *R. v. Lapiet* (1784), 1 Leach, C. C. 320, that to remove an earring from the curls of a lady's hair, where it had accidentally been fixed, is a sufficient carrying away.

A watch was carried in a waistcoat pocket, with a chain attached, passing through the button-hole of the waistcoat, being there secured by a watch-key. The prisoner took the watch out of the pocket, and by force drew the chain out of the

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button-hole. But the watch-key having been caught by a button of the waistcoat, the watch and chain remained suspended. *Held*, a sufficient severance to maintain a conviction for stealing from the person. *R. v. Simpson* (1854), 6 Cox, C. C. 422.

To constitute a stealing from the person, the thing must be completely removed therefrom. Removal from the place where it was, if it remains throughout with the person, is not sufficient, but such removal would be sufficient to constitute simple larceny. *R. v. Thompson* (1825), 1 Moo. C. C. 78.

One having lifted up a bag from the boot of a coach was detected before he got it out, and it did not appear that it was entirely removed from the space it at first occupied in the boot, but the raising of it from the bottom had completely removed each part of it from the space that specific part occupied. The court *held* that this was a complete asportation. *R. v. Walsh*, 1 Moo. C. C. 14.

R. v. PRESTON (1851), 2 Den. C. C. 353, 5 Cox, C. C. 390, 2 Lead. C. C. (B. & H.) 417-432, 8 Eng. Law & Eq. 589; *cited*, Bish. C. L., 3 Gr. Ev. 159, Mews' E. C. L. (Criminal Law). *Larceny; finding of lost property.* *R. v. Thurborn*.

R. v. PRINCE (1875), L. R. 2 C. C. R. 154, 13 Cox, C. C. 138, 13 Mo. Eng. Rep. 385, 3 Crim. Law Rep. (Hawley) 1; Mews' E. C. L. (Criminal law): *stated*, C. v. Murphy (1895), 165 Mass. 66, 52 Am. St. 496, n., 8 Rul. Cas. 25; *cited*, 1 Bish. C. L. 302a, 303a, Mech. Ag. 746; C. v. Cook. § 294, Gr. & Rud.

R. v. Prince stated: P. fell in love with a sixteen-year-old girl, protected by a statute forbidding the taking of such from parental charge. She told P. she was eighteen, and he, believing this, violated the statute. Held, he was guilty. If one intends to commit a crime he is responsible for his act if he commits another crime than the one intended. It was no defense that defendant bona fide believed girl was over sixteen years of age.

Statutory crimes. Ignorantia facti excusat, ignorantia juris non excusat, does not apply in all statutory crimes. *P. v. Robey*. See *Actus non facit reum nisi mens sit rea*.

Abduction. It was no defense that a girl was believed to be over sixteen years of age. Purity of motive nor ignorance of fact is no defense in such cases. *R. v. Prince*; Bish. Stat. Crimes, 634.

Abduction of women. Bish. Stat. Crimes, 614-624; 5 Law Crim. Def. 723-732; 1 Encyc. Pl. & Pr. 50-52.

R. v. PYM (1846), 1 Cox, C. C. 339; *stated*, Mews' E. C. L. (Criminal Law). *Cited*, § 346, Hughes' Proc.; §§ 293, 294, Gr. & Rud.

R. v. Pym stated: Homicide; real cause of death; remoteness. A wound erroneously treated is no defense. It is sufficient if death is traceable to the assault. In jure non remota.

2 Bish. C. L. 638; McAllister v. S. (1850), 17 Ala. 434, 52 Am. Dec. 180-184, n.

Limitations. But death must ensue in one year and a day. 2 Bish. C. L. 640; S. v. Orrell (1826), 1 Dev. 139, 17 Am. Dec. 563-566.

Concurrence of previous disease aggravating an injury is no defense. Louisville R. R. v. Northington (1891), 91 Tenn. 56, 16 L. R. A. 268. *In jure non remota.*

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Time when homicide is presumed to be committed. Debnay v. S. (1895), 45 Neb. 856, 34 L. R. A. 851-856, ext. n.

Gross ignorance or inattention of a medical man supplies intent. 1 Bish. C. L. 314; C. v. Pierce (1884), 138 Mass. 165, 52 Am. Rep. 264; S. v. Hardister (1882), 38 Ark. 605, 42 Am. Rep. 5; R. v. Williamson (1839), 3 C. & P. 635 (14 E. C. L. R.). See S. v. Schulz (1881), 55 Ia. 698, 39 Am. Rep. 187; R. v. Morby. *Physician's ignorance or mistake, if gross and reckless, is criminal.* C. v. Pierce, *supra*.

R. v. REDMAN (1865), L. R. 1 C. C. R. 12, 10 Cox, C. C. 159; *stated*, Mews' E. C. L. (1885) (Criminal Law), Jac. Fish. Dig.: *cited*, 2 Bish. C. L. 1200.

R. v. Redman stated: Blackmail; threat to accuse of infamous crime. Threatening to accuse his son of an abominable offense upon a mare, with intent to extort money, is an indictable offense. Mann v. S., 47 O. St. 556, 11 L. R. A. 656, n.

It is immaterial whether the person against whom the accusation is threatened be innocent or guilty, if the prisoner intended to extort money. R. v. Gardner (1842), 1 C. & P. 470 (12 E. C. L. R.). *Generally*: 2 Bish. C. L. 1200, 1201, n.; 4 Crim. Def. 824-837.

Evidence is inadmissible to show that the prosecutor is guilty. However, to affect his credibility he may be cross-examined with reference to it.

Compounding a felony; extorting money. Guilt or innocence of the prosecutor is material to determine whether the accused is guilty of blackmail or compounding a felony. R. v. Richards (1868), 11 Cox, C. C. 43. *Defined.* Edsall v. Brooks (1864), 2 Robertson (N. Y. Sup. Ct.), 29, 34, 17 Abb. Prac. (O. S.) 226, 26 How. Prac. 431. Extortion is closely allied with Am. Steamship Co.; C. v. Bagley. Extorting money or property by threats. Mann v. S. (1890), 48 Ohio, 556, 11 L. R. A. 656, n. *Threatening letters and other threats.* 2 Bish. Cr. Proc. 1024-1029b; Mann v. S., *supra*. Oral threats sufficient under some statutes. R. v. Redman.

R. v. RICE (1866), L. R. 1 C. C. R. 21, 10 Cox, C. C. 155. *Public morals*; disorderly houses suppressed. R. v. Crunden.

R. v. RILEY: L. C. 213b.

R. v. ROWLANDS: L. C. 234.

R. v. SALMON AND OTHERS (1880), 6 Q. B. D. 79, 14 Cox, C. C. 494; *stated*, Clark, C. C. 32, Mews' E. C. L. 1507 (Criminal Law): *cited*, 1 Bish. C. L. 314 636, 2 *id.* 738.

Homicide; murder; negligence; gross negligence supplies malice; tacking and collateral intent. Shooting at a short-range target with a long-range rifle, and killing a boy in a tree beyond the target, is manslaughter. R. v. Lowe; R. v. Longbottom. Killing one unintentionally is commission of a civil wrong, a mere trespass; is not murder, it seems. R. v. Longbottom. See *Actio personalis*.

R. v. SCAIFE (1851), 17 Adol. & El. (N. S.) 237 (79 E. C. L. R.), 17 Q. B. 238, 2 Den. 281, 1 Tay. Ev. 442, 1 Wh. Ev. 178, Mews' E. C. L. (Criminal Law). One who keeps a witness away impliedly authorizes the reading of his deposition, otherwise inadmissible. *Nullus commodum; Volenti*.

R. v. SERNE & GOLDFINCH (1887), 16 Cox, C. C. 311, Clark, C. C. 211, Chap. 183, Mews' E. C. L. (Criminal Law): *cited*, 2 Bish. C. L. 679, 687, 694. *Cited*, § 13, Hughes' Proc.

R. v. Serne.—

R. v. Serne stated: Homicide; "constructive murder"; tacking and collateral intent. Aiming at one and killing another is no defense, unless initial cause was justified. Setting fire to a building, however, not knowing a person is within, who is burned to death, is not murder. Act must involve intention to take life. Shooting at a fowl with intent to steal it, but killing a man, is not murder; but otherwise if a man assaults a woman to rape, yet squeezes her until he kills her.

See Foster, Crown Law; R. v. Latimer; notes, 18 Am. Dec. 786; Splice v. P.; *Actus non facit reum*, etc.

Aiming at one and killing another, whether murder or not, depends on moving excuse. Barcus v. S. (1873), 49 Miss. 17, 19 Am. Rep. 1, n.; Laceyfield v. S. (1875), 34 Ark. 275, 36 Am. Rep. 8, n.; S. v. Gilman (1879), 69 Me. 163, 31 Am. Rep. 357; Golliver v. C. (1865), 2 Duvall (Ky.), 163, 87 Am. Dec. 493; notes, 18 Am. Dec. 786. When one person is killed by mistake for another, the character of the offense is the same that it would have been if the fatal shot or blow had killed the person for whom it was intended. Clarke v. S. (1885), 78 Ala. 474, 6 Am. Cr. R. 525.

A spectator at a prize-fight is as guilty as a principal. R. v. Coney; R. v. Orton. But one is not guilty of arson who sets fire for another purpose than burning the building.

R. v. SEERLOCK (1866), L. R. 1 C. C. 20, 10 Cox, C. C. 170, Mews' E. C. L. (Criminal Law), 3 Jac. Fish. Dig. 3061. *Posse comitatus; duty to aid, if summoned, is peremptory.* One must aid for example's sake, regardless of consequences. Robinson v. S.

R. v. SMITH (1826), 2 Car. & P. 449 (12 E. C. L. R.), 3 Crim. Def. 751; *stated*, Mews' E. C. L. (Criminal Law), Jac. Fish. Dig., *cited*, 1 Bish. C. L. 217, 557, 2 *id.* 660. §§ 293, 294, Gr. & Rud.

R. v. Smith stated: George S. was forty years old, an idiot, and after his father's death his brother and sister left him to shift for himself. He suffered from neglect, but the omission to care for him was no crime. No violation of positive duty existed.

Crimes. Acts of omission, not connected with duty, are not crimes. 3 Crim. Def. 751-857. Brothers and sisters do not owe to each other a duty of support. Porter v. Powell. See R. v. Hughes; R. v. Conde; R. v. Lowe; R. v. Smith; *Actus non facit reum*.

R. v. SMITH (1868), 10 Cox, C. C. 82.

R. v. Smith stated: Martha Turner was a weak-minded servant of Mrs. S., who was cruel and domineering and exercised great influence over her imbecile servant, who was lodged in an unhealthy apartment and fed on insufficient food, from which she died. Held, S. was guilty of murder.

Crimes. One preventing another from protecting himself is guilty of a crime. *Nul-lus commodum capere.* See also R. v. Smith; R. v. Conde; *Actus non facit reum*.

R. v. SOLOMONS (1890), 17 Cox, C. C. 93, Mews' E. C. L. (Criminal Law): *cited*, 2 Bish. C. L. 813. § 106, Hughes' Proc.

R. v. Solomons stated: Larceny; false pre-

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tenses: distinctions. The prisoner was indicted for larceny of money which he had parted with, in what is known as the purse trick, by means of which the prisoner induced the prosecutor to part with his money upon the apprehension that he was buying a purse into which the prisoner pretended to have dropped coins. Having parted with his money, his consent being given, *held*, not larceny, but obtaining money under false pretenses.

This case clearly shows the distinction between the crimes of larceny by trick and false pretenses, and should be studied together with *R. v. Buckmaster*; also *R. v. Harvey* (1787), 1 Leach, 467; *R. v. Adams* (1812), R. & R. 225; *R. v. Thomas* (1841), 9 C. & P. 741 (38 E. C. L. R.); *R. v. Wilson* (1837), 8 C. & P. 111 (34 E. C. L. R.).

Coleridge, C. J., said: "This case is really upon consideration too clear for me to entertain any doubt about it. Of course, one hesitates to let a man off if he is guilty of a gross fraud, and it is a matter for regret to have to let off a man who is really guilty of something. But as long as we have to administer the law we must do so according to the law as it is. We are not here to make the law (*stare decisis* should be applied); and by the law of England, though it is enacted by 24 & 25 Vict., ch. 96, sec. 88, that a man indicted for false pretenses shall not be acquitted if it be proved that he obtained the property with the stealing of which he is charged in any such manner as to amount in law to larceny, unfortunately the statute stops there, and does not go on to say that, if upon an indictment for larceny the offense committed is shown to be that of false pretenses, the prisoner may be found guilty of the latter offense. The statute not having said it, and the one offense being a misdemeanor while the other is a felony, you cannot, according to the ordinary principles of the common law, convict for the misdemeanor where the prisoner is indicted for the felony. (*Expressio unius est exclusio alterius*; Windsor v. McVeigh.) Now, the law is plain, that where the property in an article is intended to be parted with, the offense cannot be that of larceny. Here it is quite clear that the prosecutor did intend to part with the property in the piece of coin, and the case is not like any of those cases in which the prosecutor clearly never intended to part with the property in the article alleged to have been stolen. Whether or not the prosecutor here intended to part with the property in the coin does not signify, if what he did was in effect to part with it for something which he did not get. I have already said that you cannot convict of false pretenses upon an indictment for larceny, and as the offense here was, if anything, that of false pretenses, and the indictment was for larceny, it follows that this man must get off on this indictment. I am therefore of opinion that this conviction must be quashed."

Hawkins, J., said: "I cannot myself imagine a clearer illustration of the difference between the offense of false pretenses and that of larceny than is afforded by this case. It is perfectly clear that the prosecutor intended to part with the property in the coins, and that being so, the case is clearly not one of larceny."

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Primal essentials of *res adjudicata*. Former jeopardy requires that a crime be charged, and also that one be tried upon that charge and no other. *U. S. v. Perez*: 69; *Huntsman*: 231; *Cruikshank*: 232; *R. v. Perrott*; *C. v. Roby*: 74; *Austin R. v. Cluck*.

R. v. STEDMAN (1704), Fost. C. Law, 292; *cited*, 2 Bish. C. L. 703.

R. v. Stedman stated: S., a soldier, interfered to stop a street brawl. He was assailed by a woman, and afterwards she slapped him, and he struck her with the handle of his sword. Then she struck him in the face with an iron pattern, and ran away, and he, bleeding badly, followed her and ran her through with his sword. His condition was considered upon a charge of murder. "The smart of the man's wound and the effusion of blood might possibly keep his indignation boiling to the moment of the fact."

Homicide; manslaughter; provocation; cooling time. *U. S. v. Holmes*; Brown v. S. (1873), 38 Tex. 482, 3 Crim. Def. 1085, n.; *McCann v. P.* (1866), 6 Park. 629, 5 Crim. Def. 1089, n.; *Price v. S.* (1885), 18 Tex. App. 474, 51 Am. Rep. 322, 5 Crim. Def. 1095; *Hudson v. S.* (1879), 6 Tex. App. 565, 5 Crim. Def. 1100; *S. v. Moore* (1873), 69 N. C. 267, 5 Crim. Def. 1107, ext. n. (cooling time).

R. v. THURBORN (1849), 1 Den. C. C. 387, Temple & Mew. C. C. 67; 2 Car. & Kir. 831, 2 Lead. Crim. Cas. 409-432, ext. n. 5 Crim. Def. 424, n., Chaplin. C. C. 332, Beale, C. C. 145; *stated*, 37 L. R. A. 122-124, Clark, C. C. 372, 4 Mews' E. C. L. 1321 (Criminal law—against property of individuals): *cited*, 1 Bish. C. L. 287, 303, 2 id. 758, 838, 876, 879, 882, McClain, C. L. 571, New. Def. 114, 3 Gr. Ev. 159. *Cited*, § 294, Gr. & Rud.

R. v. Thurborn stated: T. found a bank note and kept it a day, when he learned that Brown had lost it. Then T. passed it for silver, and he was arrested for larceny. *Held*, not guilty; for he did not at first know who the owner was, and therefore his original intent was not to steal. The taking must be with *animus furandi*. T. did not know who the owner was nor where he could be found. *Actus non facit reum*, etc. *S. v. Hayes* (1896), 98 Ia. 619, 37 L. R. A. 116-127, ext. n.

Larceny by finder. Finding property and making no effort whatever to ascertain the owner and return it, but on the contrary evincing an intention to appropriate it, constitutes larceny. 37 L. R. A. 116-127, ext. n., *supra*; *R. v. Preston*; 3 Gr. Ev. 159: cases.

Bailee; larceny by. *R. v. De Banks*; *Holbrook v. S.* (1894), 107 Ala. 154, 54 Am. St. 65, n.

Belief as to who owner is, essential. The doctrine in *R. v. Thurborn* is, that the prisoner must believe that he could find the owner at the time he found the article. *R. v. Gilde*, L. R. 1 C. C. R. 139. But otherwise where the finder knows he can find the owner. *R. v. Pope* (1834), 6 Car. & P. 646 (25 E. C. L. R.); *R. v. Wynne*, 2 East, P. C. 664.

The animus furandi must co-exist with the finding. For if at that time an honest intention existed, but subsequently this was altered, then there is no larceny. *R. v. Christopher* (1858), 28 L. J. M. C. 35.

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A servant finding an article on the master's premises must inquire of him about the ownership. Failing to do so and removing the goods is larceny. *R. v. Kerr* (1837), 8 C. & P. 176 (34 E. C. L. R.).

If a bureau is delivered to a carpenter to repair, and he discovers money in a secret drawer of it, which he unnecessarily, as to its repairs, breaks open and converts the money to his own use, it is a felonious taking of the money, unless it appears that he did it with the intention to restore it to its rightful owner. *Cartwright v. Green* (1802), 2 Leach, C. C. 952; *Bro. Max.* 307.

A person purchased, at a public auction, a bureau, in which he afterwards discovered, in a secret drawer, a purse containing money, which he appropriated to his own use. At the time of the sale no person knew that the bureau contained anything whatever. *Held*, that if the buyer had express notice that the bureau alone, and not its contents (if any), was sold to him; or if he had no reason to believe that anything more than the bureau itself was sold, the abstraction of the money was a felonious taking, and he was guilty of larceny in appropriating it to his own use. But that if he had reasonable ground for believing that he bought the bureau with its contents (if any), he had a colorable property, and it was no larceny. *Merry v. Green* (1841), 10 L. J. M. C. 154; *Bro. Max.* 807.

This will illustrate the idea or mistake in the law of sales—contracts. *Boston:* 320.

Where a box of plate was brought up from the bottom of the river by ballast heavers while engaged in their ordinary business, and the contents were disposed of by them, it is a question for the jury whether, under the circumstances, they had sufficient means of discovering the owner, or had wilfully abstained from making any endeavors towards such discovery, to constitute a larceny. *R. v. Scully* (1845), 1 Cox, C. C. 189.

A person finding property which has no mark upon it by which the owner can be traced is yet guilty of larceny if he appropriates it to his own use without making inquiries on the subject, unless he has fair reason to believe that the property has been abandoned by the owner. *R. v. Coffin* (1846), 2 Cox, C. C. 44.

A stockbroker who ignores the written instructions of his principal to buy certain stock, and appropriates a check inclosed in the letter, is guilty of larceny. *R. v. Crommire* (1886), 2 Cox, C. C. 42.

It is to be observed that the above cases are founded upon a statute (24 & 25 Vict., ch. 96, § 75); but very similar statutes are in many jurisdictions, and possibly in many instances they are affirmative of the common law.

A banker receiving deposits, knowing at the time the bank will immediately suspend, and cannot and will not respond to checks drawn against such deposits, is

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guilty of larceny. Such parting with money is without the owner's consent, and the receiver knows at the time that the owner is defrauded. Here are the ingredients of larceny. *Sub R. v. Ashwell*. This is a gross and culpable fraud. *Grant v. Walsh* (1895), 145 N. Y. 502, 45 Am. St. 626.

Criminal liability for receiving deposits in bank, knowing its insolvency. *C. v. Jenkin* (1895), 170 Pa. 194, 31 L. R. A. 124, ext. n. *Cheating by worthless bank checks.* *R. v. Hazelton. Drawing bill or check without funds is a fraud.* 2 Danl. Nego. Insts. 1586, 1629. Illuminating gas; larceny of, from pipes. 12 Crim. Law Mag. 170-173. *See LARCENY.*

Fraudulent reception of deposits; right of depositor to follow. *Bruner v. First Nat. Bk. of Johnson City* (1896), 97 Tenn. 540, 34 L. R. A. 532, ext. n. *Richardson v. New Orleans Co.* (1900), 42 C. C. A. 619, 102 Fed. 780, 52 L. R. A. 67, ext. n.

Larceny is the felonious taking and carrying away of the personal goods of another. *S. v. Homes*, 57 Am. Dec. 269, ext. n. A taking and carrying away of personal property with intent to steal it. The taking must be with intent to deprive the owner of his property permanently. *Note*, 57 Am. Dec. 275; *Dove v. S.* (1881), 37 Ark. 261. The wrongful or fraudulent taking and carrying away by any person of the mere personal goods of another from any place with the felonious intent to convert them to his (the taker's) use and make them his property without the consent of the owner. *Ransom v. S.* (1852), 22 Conn. 153; *R. v. Poynton*.

The intent must be felonious: Animus furandi. Taking to use and return is a mere trespass. *Note*, 57 Am. Dec. 273.

The property must be personal. At common law, taking a tree, flowers, fruit, or title-deeds, is a trespass upon the land. But if any such object was severed by the owner or by the thief at another time, that act made it personalty. Statutes have made felonious appropriations of many such articles as formerly constituted trespass. At common law realty is not a subject of larceny, and of course this includes fixtures. There are great discussions as to what is realty and what personalty, and when the latter, severed from realty (like ore or minerals), become personalty and a subject of larceny.

Formerly, also, bonds, bills, notes and other evidence of debt, having no intrinsic value and not importing property in the possession of the holder, were not subjects of larceny.

Personal property only subject to larceny. In this connection the question often arises, what is a fixture? *Elwes v. Mawe*.

Property includes money, goods, chattels, things in action and evidences of debt; but not, at common law, animals at their natural liberty and unreclaimed; nor those which are unfit for food, as dogs. However, for these a civil action for damages may be had. 4 Bl. Com. 232-235. Obtaining possession of personalty by fraud, with intent to convert the same to one's own use, the owner intend-

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ing to part with the possession only, is larceny.

A trespass and the animus furandi must concur.

"Where a man, driving a flock of lambs from a field, drove with the flock a lamb belonging to another person without knowing that he did so, and afterwards, when he discovered the fact, sold the lamb, denied having done so, and appropriated the proceeds to his own use, the court held that he was guilty and rightly convicted of larceny."

For, having in the first instance driven away the lamb, the property of another, he committed a trespass, which, as soon as he resolved to dispose of the animal (the trespass continuing all along), became a felonious trespass. *R. v. Riley* (1853), Dears. 149, 14 Eng. L. & Eq. 544: cited, Bish. C. L., q. v.

Evidence; proof; what sufficient. Note, 5 Crim. Def. 581-638. *Recent possession of the fruits of crime.* *R. v. Partridge*: 190. *Value must be proved.* *R. v. Edwards*; Burrows v. S. (1894), 137 Ind. 474, 45 Am. St. 210. *Corpus delicti* must be proved. Matthews: 193.

Actus non facit reum, etc.: The act itself does not make a man guilty, unless his intentions were so, is closely inquired after in larceny. This is well illustrated in *R. v. Thurborn* and likewise in *R. v. Ashwell*. In this case, the possessor of a sovereign was intending to part with a shilling, and both he and the recipient of it believed at the time that a shilling was given and received; but in fact a sovereign passed, which the receiver disposed of, and made evasive and fabricated statements concerning it. *Held*, he was guilty of larceny. He, the owner, did not consent to giving a sovereign, but only a shilling, and the evidence showed that the receiver, as soon as he found what he possessed, determined to appropriate it. Out of these facts all of the essentials of larceny were present. Discovery of mistake may be a taking and carrying away, if immediately attended with the intention of converting the property. The above cases well illustrate this idea.

Larceny, generally. 2 Bish. C. L. 757-904, Bish. Stat. Crimes, 410-462; *S. v. Homes, supra*; 5 Crim. Def. 393-638, Clark, Crim. Cas. 330-394, 3 Gr. Ev. 150-163, 2 Bish. Cr. Proc. 696-780. See LARCENY, and cases there cited.

R. v. TOLFREE (1830), 1 Moody, C. C. 243, 2 Lead. Crim. Cas. (B. & H.), 358-362, overruling *R. v. Clark* (1829), 1 Moody, C. C. 243, n.: *stated*, 4 Mews' E. C. L. (Criminal Law), Jac. Fish. Dig. cited, 1 Bish. C. L. 362, 2 id. 874.

R. v. Tolfree stated: Larceny; taking goods by delivery of adulteress. An adulteress stole, jointly with the wife, money and plate, wearing apparel and goods, the property of her husband. *Held*, that he was guilty of larceny. *R. v. Featherstone*. This is analogous to the law of partners. Here one cannot steal of another; but if one conspires with a third person to steal of another partner, then the larceny is complete.

R. v. Robson (1885), 16 Q. B. Div.

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137, 15 Cox, C. C. 772, 2 Bish. C. L. 185, 207, 198, 214.

R. v. TOLSON (1889), 23 Q. B. D. 168, 16 Cox, C. C. 629; Beale, C. C. 68, 12 Crim. Law Mag. 96-119, 8 Rul. Cas. 16-89, n.: *stated*, Clark, C. C. 55, Suth. Stat. 365, n., Mews' E. C. L. (Criminal Law): *cited*, 1 Bish. C. L. 291, 291b, 303a, 395.

Bigamy. Bona fide belief in death of former husband and wife is a defense. Actus non facit reum, etc. applies. Mens rea discussed and defined. *P. v. Robey*; *C. v. Mash. Mens rea*; criminal intent. 8 Rul. Cas. 16-89.

R. v. TOLPHY (coercion): *Necessitas.*

R. v. TOWNLEY (1870), L. R. 1 C. C. R. 315, 12 Cox, C. C. 59, Chaplin, C. C. 256, Beale, C. C. 133, 2 Crim. Def. 224: *stated*, Mews' E. C. L. (Criminal Law), Jac. Fish. Dig. *cited*, 2 Bish. C. L. 766, 2 Crim. Def. 251, 314, 321, 424.

R. v. Townley stated: Larceny; stealing of wild animals; animals fera natura; to whom they belong; abandonment. Trespassers, poaching on land, killed and bagged rabbits. Being detected, to elude arrest they hid the bag and its contents, intending to return and carry it away, which they afterwards did. Held, no abandonment, and that in the absence of this, the owner of the soil had not become the owner of the rabbits, and therefore the subsequent asportation, under the circumstances, was insufficient to constitute larceny.

Wild animals. In animals *fera natura* there is no absolute property. There is only a special or qualified right of property, a right *ratione soli*, to take and kill them. When killed upon the soil they become the absolute property of the owner of the soil, as fixtures. *Elwes v. Mawe*. This was decided in the case of rabbits in *Blades v. Higgs*, 11 H. L. C. 621, and in the case of grouse, in *Lonsdale v. Rigg*, 1 H. & N. 923.

Fixtures; larceny of; act of separating and removing. "Asportation," if continuous act, is not larceny. To constitute larceny at common law the thief must take and carry away. A tree is not the subject of, if the act of converting it into a chattel is accomplished by the taking of it away. Converting a fixture into realty, and taking and carrying it away, must be separable acts to constitute larceny.

R. v. TWOSE (1879), 14 Cox, C. C. 327: *stated*, Keener, Quasi-Conts. 88, Clark, C. C. 123, Mews' E. C. L. (Criminal Law), Jac. Fish. Dig.: *cited*, 1 Bish. C. L. 303.

The belief, though erroneous, of a person in the existence of a right to do the act complained of, excludes criminality. *R. v. Twose*; *R. v. Mathews* (1876), 14 Cox, C. C. 5; *S. v. Homes*; *R. v. Child* (1871), L. R. 1 C. C. R. 307, 1 Cox, C. C. 64.

R. v. TYLER AND PRICE (1838), 8 C. & P. 616 (34 E. C. L. R.): *stated*, 38 Am. St. 141, 19 L. R. A. 358: *cited*, 106 Am. St. 725, 1 Bish. C. L., 3 Gr. Ev. 8, 138, 2 Bish. Cr. Proc. 3, Mews' E. C. L. 1109 (Criminal Law); *Arp v. S.* (1892), 97 Ala. 5, 38 Am. St. 137, n., 19 L. R. A. 357-362, n. (duress as an excuse for crime).

Intent; compulsion; duress. Personal danger is no excuse for one making murderous assault on third person. *Bro. Max*, 18; *R. v. Dudley*. See *Necessitas*.

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*Act and intent must concur to constitute Crime. Actus non facit reum, etc. The mens rea must co-exist with the act to constitute crime. P. v. Robey; R. v. Prince; Meadowcroft v. P. (1896), 163 Ill. 56, 36 L. R. A. 176. Arson; generally; procedure. 2 Bish. Cr. Proc. 31-53. One is not justified in committing lawlessness from apprehension of injury if he refuses to do it. U. S. v. Holmes. See 6 Am. & Eng. Encyc. Law, 89: cases; R. v. Crutchley, sub *Necessitas*. Whart. C. L. 9th ed., Bish. C. L. 346, 7th ed.; 106 Am. St. 715-728; See COERCION.*

A boy twelve years old who is coerced is not an accomplice. Beal v. S. (1883), 72 Ga. 200; F. v. Miller (1885), 66 Cal. 468, 19 L. R. A. 358. Necessity and compulsion as a defense. 1 Bish. C. L. 346-355; Actus Dei, etc.; 2 Gr. Ev. 8, 138.

R. v. VANDERCOMB: L.C. 73.

R. v. VAUX: L.C. 72.

R. v. WATERS: L.C. 71.

R. v. WABERTON: L.C. 70.

R. v. WHEATLEY: L.C. 19.

R. v. WHILEY: Sub Res inter alios acta.

R. v. WYNN (1887), 16 Cox, C. C. 231, Mews' E. C. L. 1372 (Criminal Law).

R. v. Wynn stated: Bailee; larceny by a watchmaker receiving a watch for repairs, who pawns it to secure a loan with the intention to appropriate it, is guilty of larceny.

Mere pawning, however, does not constitute. It must be fraudulent conversion. Syeds v. Hay (1791), 4 T. R. (D. & E.) 260; Wilbraham v. Snow (1861), 2 Saund. Rep. 47. An infant, a hirer of furniture, may be guilty of larceny as bailee. R. v. McDonald (1885), 15 Q. B. D. 223. And similarly a married woman may be liable. R. v. Robson (1861), L. & C. 93.

R. v. YORK (1748), Foster's Crown Law, 70, 1 Lead. C. C. (B. & H.) 71-80: cited, 3 Gr. Ev. 4. § 294, Gr. & Rud.

R. v. York stated: Y., a boy ten years old, killed a girl of five and buried her in a manure pile. He fabricated evidence to excuse himself and throw off suspicion. He was convicted.

Infants: criminal liability of; confessions. A child ten years old may commit murder, if he knew he was doing wrong. R. v. York; R. v. Owen; Godfrey v. S. 70 Am. Dec. 494, ext. n. See Actus non facit reum, etc. So a boy of twelve. S. v. Guild (1828), 5 Halst. (N. J.) 163, 18 Am. Dec. 404; S. v. Yeargan (1895), 117 N. C. 706, 36 L. R. A. 196-211, ext. n. (criminal liability of children).

Infants incapable of crime under fourteen, prima facie presumed innocent (R. v. Owen), and conclusively presumed incapable of committing rape. Over fourteen are liable as adults. Note, R. v. York; Godfrey v. S.; R. v. Owen; 5 Crim. Law Mag. 210-218; 1 Bish. C. L. 368; 3 Gr. Ev. 4.

Rape. The conclusive presumption of incapacity to commit rape does not obtain in countries where sexual development is earlier than in England. S. v. Jones (1887), 39 La. 835, 3 So. 57, 10 Crim. Law Mag. 89-92; C. v. Green (1824), 2 Pick. (Mass.) 380; Moore v. S. (1867), 17 Ohio St. 521. Cessante ratione, etc.

Incapacity for crime resulting from infancy. 1 Bish. C. L. 367-373; McClure v. C. (1883), 81 Ky. 448, 5 Crim. Law Mag. 210-218, n.; 3 Crim. Def. 119-139. Infants liable for torts, like adults. Gilson

R. v. York.—

v. Spear, 78 Am. Dec. 659. Testamentary capacity of. Converse. Witnesses; competency of. R. v. Hill, B. & H. Lead. C. C.

Contracts of infants. See INFANTS.

REYNOLDS v. STOCKTON: L.C. 79a.

REYNOLDS v. U. S. (1878), 98 U. S. 145, 6 Ct. Opin. Gt. Judges, 718, Chaplin, Crim. Cas. 32, Brown, Jurisdic. Public morals protected. Graver: 103; Barbier.

RICE v. DWIGHT MANUFACTURING Co. (1848), 2 Cush. (Mass.) 80, 85; cited, Chit. Conts. Mutual mistake avoids a sale. §§ 114, 134, Hughes' Conts.; Wheadon: 349.

RICE v. SHUTE: L.C. 95.

RICE v. TRAVIS (1905), 117 Ill. App. 644; cites *Crogate*; *Savacool*: 164.

*Rice stated: Gibson, a constable, under a writ of replevin sued out by Meader from a justice seized and disposed of certain goods belonging to Travis, but in the possession of his wife. She sued G. and others who claimed the property under the proceedings. G. died. Judgment was given against the claimants to the property because they could not defend under the plea of regular process alone, nor further, a plea of justification of the justice's judgment without allegations and proofs that the property did not exceed in value \$200, the limits of the justice's jurisdiction. This was a jurisdictional fact and must be alleged and proved by those defending under the proceedings. It could not be presumed from the judgment alone. A plaintiff's general replication of *de injuria sua propria* was sufficient without a special replication to the plea setting forth the value of the property. Under the rule in *Crogate's Case* this could not be presumed within the jurisdiction of the justice.*

On principle the plea of justification was open to general demurrer. It lacked allegations. Filing a replication did not waive that omission. See Bowman v. P.; Harrow v. Grogan.

Regularity is not presumed for inferior and statutory tribunals. Hannah: 128; Omnia presumuntur rite.

Mere possession of goods is sufficient against a wrongdoer. C. & N. W. R. v. Shultz (1870), 55 Ill. 421; Armory: 180; Omnia presumuntur contra spoliatores.

Regular process is the defence of the officer only and not of purchasers. Savacool: 164.

The Rice Case presents Crogate, Savacool: 164, Armory: 180, Crepps: 113; Omnia presumuntur rite; Omnia presumuntur contra spoliatores. All of these were reaffirmed. The cases should be read in the light of these. The maxims and old cases were followed. It also involves pleading a justification, which is one of the conserving policies. J'Anson: 91.

An authority must be pleaded. It matters not from what court it must come, whether superior or inferior. Had the writ been issued by a superior court it would have made no difference. See AUTHORITY. In proving an estoppel or a title founded on a judgment the mandatory record must be alleged and proved. Clem: 2c; 69 Ill. 334; 180 Ill. 110, 121; 1 Whart. Ev. 824: cases. Under this rule the language of the opinion should be enlarged by construction. The rule

Rice v. Travis.—

is not applicable to inferior courts only. *De non apparentibus*, etc. applies to all courts.

RICHARDSON v. ST. JOSEPH, ETC. Co.: L.C. 230.

RICHARDSON v. SMITH (1866), 29 Cal. 519. Denials must be certain. Doll; Dickson: 34.

RICKETSON v. RICHARDSON: L.C. 59.

RIDEOUT v. WINNEBAGO TRACTION Co. (1904), 123 Wis. 297, 69 L. R. A. 601-618.

Right to recover for ordinary negligence under allegation of gross, wilful or wanton negligence or vice versa. Guedel: 74a. *Allegata et probata* must correspond. Bristow: 135.

Alternative pleadings are faulty. Repugnant pleadings are void. Pain: 107. Inconsistent and conflicting allegations state no cause of action. Pain: 107. "We can do nothing without truth."

RIGGS v. PALMER (1889), 115 N. Y. 506, 12 Am. St. 819, n., 5 L. R. A. 340, 349, ext. n., 12 Crim. Law Mag. 119, Tiedeman, Cas. Real Prop. 759; Brown, Jurisdic. (Very instructive case.)

Murderer of devisor or ancestor cannot inherit as heir or devisee or legatee. Riggs v. Palmer; See Shellenberger v. Ransom (1894), 41 Neb. 631, 25 L. R. A. 564-577, ext. n.; Owens v. Owens, 100 N. C. 240; quoted, 28 Am. St. 509; Schmidt v. Northern Life Assn. (1900), 112 Iowa, 41, 51 L. R. A. 151 (children of beneficiary who, while insane, murder the insured forfeit all claims); McAllister, 72 Kans. 533, 3 L. R. A. (N. S.) 726-733, n. (denies Riggs).

Bona fide purchasers get no rights from crime. 199 U. S. 74. Statutes, construction of. Church v. U. S. Crimen omnia.

A beneficiary forfeits his insurance if he kills the assured. Holdom (1895), 159 Ill. 619, 31 L. R. A. 67, n.; New York Ins. Co., 96 Va. 737, 44 L. R. A. 305, n.; New York Ins. Co. (1885), 117 U. S. 599 (it would be a disgrace to jurisprudence to allow a recovery).

One can establish no rights founded upon a wrong. Sasportas; Ilisley: 169. The president of a corporation is personally liable for a fraud which inures to his personal advantage. Tyler, 143 U. S. 79. A wrongdoer is liable as a trustee *ex maleficio* for property gained by fraud. Angle v. R. R. A passenger colluding with a conductor for passage is guilty of such a fraud that it will not establish the status for the claim of and the rights of a lawful passenger. McVeety, 45 Minn. 268, 11 L. R. A. 174, n., 22 Am. St. 728.

RIGHTS NEVER DIE: See LIMITATION OF ACTIONS.

RIGHT TO BEGIN: See BUDDEN OF PROOF; OPENING AND CLOSE; Bonnell: 185; Elwell, 31 N. Y. 611; 1 Wh. Ev. 357; 1 Gr. Ev. 74, n.; Viele, 26 Iowa, 9, 96 Am. Dec. 83, n.; Preston, 26 Iowa, 205, 96 Am. Dec. 140, 3 Sedgk. Dam. 1286; Actore; CONCLUSION. §§ 267, 268, Gr. & Rud.

"Burden of establishing issue.—It is of the utmost importance to know in the beginning who has the burden of ultimately establishing the issue or matter in dispute, for this determines, as a general rule, the right and correlative duty to open and close the evidence and argument. It is determined in the beginning, and determined once for all. It is determined, however, rather as a matter of procedure,

Right To Begin.—

or, to some extent, even of substantive law, rather than by the law of evidence." § 130, 1 Ell. Ev.; *Frustra probatur*; Saunderson; Gay: 138. Kollock. Pleadings cannot be waived.

RIOT: Stephens v. Myers: cases; 2 Bish. Cr. Proc. 992-1000, 3 Gr. Ev. 216-222. 2 Bouv. 930; And. Dic.

RIPARIAN: Jurisdiction over boundary rivers. Roberts, 117 Wis. 222, 65 L. R. A. 953-973, ext. n.; 2 Bouv. 931; And. Dic.; *Aqua currit*.

Rights. 59 L. R. A. 17-94, ext. n.; P. v. Hulbert (1902), 131 Mich. 156, 100 Am. St. 588 (states Acton and Mason v. Hill). Use of navigable. Monroe, 35 Wash. 487, 70 L. R. A. 272-280.

RISON v. FARR: L.C. 253.

ROACH v. GLOS (1899), 181 Ill. 440 (a reply essential for an issue). Cited, § 126, Gr. & Rud. See Israel: 83; Sache.

ROBBERY: What force is sufficient to constitute. Jones v. C. (1902), 112 Ky. 689, 57 L. R. A. 432-447, ext. n. *Extortion by frightening; obtaining money under false pretenses.* Outline citation. R. v. McGrath. See FORCIBLE TRESPASS; *Salus populi*.

Generally: 2 Bouv. 935; And. Dic.

ROBBINS v. CHICAGO: See M'Manus v. Crickett.

ROBBINS v. LINCOLN (1868), 12 Wis. 8. Denials must be certain. Doll; Dickson: 34.

ROBERTS v. MOON (1794): Dilatory: Abatement pleadings are disfavored. See ABATEMENT: Kraner: 299; § 103, Gr. & Rud. The principle in *Roberts v. Moon* is fundamental.

ROBERTS v. SMITH: See M'Manus v. Crickett.

ROBINSON v. DAVISON: L.C. 309.

ROBINSON, IN RE (1895), 117 N. C. 533, 53 Am. St. 596, n. Inherent power of courts to punish for a contempt. Hale v. S.; Farnham; Stapleton v. F. (1889), 18 Colo. 568; Yates. See CONTEMPTS.

Ex parte Jose Luis Fernandez (1861), 10 C. B. (N. S.) 3 (100 E. C. L. R.). 15 Rul. Cas. 1-37, n.; Wait, L. R. 2 Hou. L. Cases, 361-367, 15 Rul. Cas. 27-37, n. (contempts).

ROBINSON v. BAILEY: L.C. 45.

ROBINSON v. B. B. (1903), 117 Ga. 168, 43 S. E. 452, 97 Am. St. 156. The mother of a bastard cannot recover for negligence causing its death as a lawful mother might. *Bastardus*, etc.

A bastard has no heirs except those born of its own body.

Remedial statutes are construed strictly according to the common law. Lonstorf; Davenport: 27; Burks: 217a.

ROBINSON v. B. (1897), 93 Ga. 77, 44 Am. St. 127-140, ext. n. (*posse comitatus*).

ROBINSON MINING COMPANY v. Johnson: L.C. 16.

ROCHESTER WHITE LEAD CO. v. Rochester, sub Hill v. Boston (Municipal corporations; liability for torts; negligence in construction of public works).

RODEN v. HELM: L.C. 12b.

RODGERS v. MO. PAC. R. R. (1907), 75 Kans. 222, 88 P. 885-892, 10 L. R. A. (N. S.) 658.

Carrier's liability for freight delayed in carriage and destroyed by "Act of God" after arriving at destination before delivery. Not liable unless the negligent delay amounted to a conversion. Cites and discusses *In jure non remota*, Scott (Squib Case), Gulle (balloon case) and the definition of Negligence in 2 Hughes'

Rodgers v. Mo.—

Proc. 1043, which is quoted and followed.
Contra: Ala. R. R., 145 Ala. 436, 117 Am. St. 54-58.

Generally the plea of necessity or of accident must be unmixed with the pleader's negligence, and accordingly the authorities are in great conflict as to the carrier's liability, the discussions of which are learned and instructive, as the *Rodgers Case* will show. It is an able discussion of *Actus Dei, In jure*, the *Squib Case* and of other principles.

Vis major excusces lesser wrongful act. Salisbury. See NEGLIGENCE.

RODRIGUEZ v. VINONI (1906), 201 U. S. 371.

Construction: *Noscitur a sociis*. Remote explanations of the use and meaning of a word will be rejected when the document offers upon its face a different and more obvious one. Compacts are construed *in pari materia*. *Dick v. U. S.*, 208 U. S. 340. One part contracts or expands other parts.

Waiver: *limitations*. "This court will not consider a claim which was not set up in the bill below, nor suggested until after the argument in this court." See Campbell: 2; *De non apparentibus*.

Documents—compacts—are construed under the law intended by the composer. Verba intentione debent inservire.

ROE v. TRANMARE (1758), Willes, 682, 2 Smith, Lead. Cas. 524-541, 506-520, 11th ed. (reviews English cases); 1 Gray, Cas. Prop. 494, 2 Pars. Conts. 621, Bro. Max. 554, 2 Dev. Deeds, 837, 2 Wash. R. P. 417, 3 *id.* 306, 379. § 215, Hughes' Proc.

Construction of compacts shall be liberal, and they shall be upheld, if possible. 3 Wash. R. P. 357, 3 Jones, Construc. 231, 2 Pars. Conts. 516, Bro. Max. 540. *Roe* accords with the maxims of the civil law: *Ut res magis valeat et Verba fortius*; *Sturdivant*: 410. And it is opposed to the rule in *Shelley's Case*, which expressed a rule that originated when feudalism was on the decline, but still dominant. See that case; *Nimia subtilitas*; *Qui hæret in litera*. Deeds; construction of. 2 Dev. Deeds, 835-880; Elwell; Cooch; Hibblewhite. Punctuation not considered. 2 Dev. Deeds, 844, 3 Wash. R. P. 397. *Contra*: 2 Whart. Conts. 651.

ROEHM v. HORST, 178 U. S. 1-22; Mech. Cas. Dam. 377. See Frost: 308a; Hochster: 308b.

ROLLER v. ROLLER (1905), 37 Wash. 242, 79 P. 788, 107 Am. St. 105, 68 L. R. A. 893-895.

A child cannot recover from its parent for a tort committed, e. g., rape. Salus populi suprema lex. Accordingly it is reasoned that the state, its institutions and eleemosinary institutions stand *in loco patriæ*, and therefore are not liable. *Hill v. Boston. Ubi jus* is not of universal application.

ROPES v. JENKINSON (1903), 45 Fla. 556, 110 Am. St. 79.

The sworn answer is evidence in equity, and of responsive matters it must be met and overcome by a preponderance of evidence. *Vigil v. Hopp*, 104 U. S. 441. See Boileau: 43; Bonnell: 185; cases; Dickson: 34; cases.

ROSE v. HART (1818), 8 Taunt. 499 (4 E. C. L. R.), 2 Moore, 547, 2 Sm. Lead. Cas. 330-361, 8th ed., 298-319, 11th ed. (mutually essential for set-off); Jac. Fish. Dig., Chit., Pars. Conts., Huffc. Ag. 141-

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147; Lauraglen, 57 S. C. 53, 49 L. R. A. 418, n. *Contra*: Sloan v. McDowell (1874), 71 N. C. 356.

ROSE v. MILES (1815), 4 Maule & S. 101, Bigl. L. C. Torts, 460-477, ext. n., 2 Sm. Torts, 585, Cool. Torts, Wood, Nuis., 3 Suth. Dam. 1038, Shear. Neg.

Nuisances; who may seek a remedy for: when a private person may sue. Hamilton: 280; 1 High. Injunc. 757; Pom. Rem. 142; Steamboat, 30 S. C. 539, 14 Am. St. 923, n., 46 S. C. 327, 57 Am. St. 688, n. *When the public may sue.* Debs; Georgetown, 12 Pet. 91.

Abatement. Hamilton: 280. Private person may abate a nuisance singularly injurious to him. Hickey, 96 Mich. 498, 35 Am. St. 621, n.; Crosland, 126 Pa. 511, 12 Am. St. 891 (abator acts at his peril); Brown, 50 N. J. L. 409, 7 Am. St. 794. See ABATEMENT.

ROSEN v. U. S.: L. C. 92.

ROSS v. HAWKEYE INS. CO. (1895), 93 Ia. 222, 34 L. R. A. 466. See Garland: 297.

Theory of the case is conclusive. Bailey v. Hornthal. See THEORY OF THE CASE.

ROSS v. HOUSTON (1853), 25 Miss. 591, 59 Am. Dec. 231, n.; Mech. Ag. 718; Sto. Ag. 140, Wh. Ag. 177. *Cited*, § 303, Gr. & Rud.

Agency; notice. Notice to the agent is notice to the principal. Ross; Agra Bk., sub Le Neve: 396; Huff. Ag. 141-147; Wittenbrock, 102 Cal. 93, 41 Am. St. 172, n.; Brothers, 84 Wis. 381, 36 Am. St. 932, n.; 2 Kent, 630, 1 Beach, Eq. 371; Akers, 33 S. C. 451, 10 L. R. A. 705, n.; McGurk, 56 Conn. 528, 1 L. R. A. 563, n.; 2 Pom. Eq. 686-676, 2 Br. & Had. Com. 549, n.; Wade, Notice, 651-701; Astor, 4 Wheat. 466; Mech. Ag. 718-731; Bigl. Fraud, 315-318; Melms, 93 Wis. 153, 57 Am. St. 899, n., 919, ext. n. See Hadley; Fairfield, 72 Me. 226, 39 Am. Rep. 319-331, ext. n.; Trentor, 46 Minn. 298, 24 Am. St. 225-233, ext. n. (attorneys); Pennoyer, 26 Or. 1, 46 Am. St. 594 (notice must relate to the subject of the agency); Birmingham Co., 99 Ala. 379, 20 L. R. A. 600, n.; Backman, 27 Vt. 187, 65 Am. Dec. 187, n.; Sweeney, 70 Conn. 274, 66 Am. St. 101, n.

Antecedent knowledge to the agency or agent affects principal. Distilled spirits, 11 Wall. 356; *cited*, Mech. Ag. 721, 722, Whart. 179; cases, ext. n.; Kerr, Fraud, 259, Bigl. Fraud, 317. This is the modern rule, generally. See Mech. Ag. 721, 722, Whart. 179, Wade, Notice, 651-701 (generally); Bank, 56 C. C. A. 554-568, ext. n. (adverse interest of agent); Constant, 111 N. Y. 604, 2 L. R. A. 734, n., 7 Am. St. 769. Exception in case of attorneys, where they should not disclose secrets. Distilled; Mech. Ag. 722; *Cessante ratione.* See Fairfield, *supra*, ext. n.; cases, Bisph. Eq. 169. *Imparted notice.* Huff. Ag. 256.

Notice to attorney is to client. Barnes, 2 Pen. & Watts (Pa.), 67, 23 Am. Dec. 62, n.; Bigl. Fraud, 316; Wittenbrock; Littauer, 92 Mich. 162, 31 Am. St. 572, n. (attorney's knowledge of unrecorded chattel mortgage, held his client's knowledge). Notice to husband is notice to the wife. See *Qui sentit*.

Director of corporation: notice to is not notice to corporation, unless he is acting in that capacity at the time notice was given. First Nat'l Bank, 11 Vroom (N. J.), 435, 29 Am. Rep. 262; Fairfield Bank, *supra*. Superintendent's knowledge of unrecorded deed is not notice to corpo-

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ration. Wickersham, 18 Kan. 481, 26 Am. Rep. 784.
Notice to councilman, whether notice to corporation. Notice to councilman of defective streets is notice to the corporation. Logansport, 74 Ind. 378, 39 Am. Rep. 79-88, r.; La Duke, 97 Mich. 450, 37 Am. St. 357, n. Officers of municipal corporation, notice to, is notice to town, when. 1 Dill. Corp. 238, n.; Jones, Neg. 183-198. Policeman; same rule applies. Rehberg, 91 N. Y. 137, 43 Am. Rep. 657.
Corporations; what is notice to and how communicated. Wilson, 23 Pa. St. 440, 62 Am. Dec. 347-352, n.; 51 Am. Dec. 162; Abb. Tri. Ev. 45; Kearney, 129 Mo. 427, 50 Am. St. 456.
Corporations; notice to agent as notice to. Washington, 6 Wash. 491, 36 Am. St. 174, n.; Little Pittsburgh, 11 Colo. 223, 7 Am. St. 226, n.; Bank, 10 Watts (Pa.), 397, 36 Am. Dec. 186-200, ext. n., Cook, Stockh. 727.

ROSSITER v. ROSSITER (1832), 8 Wend. 494, 24 Am. Dec. 62, 1 Am. Lead. Cas. 659-699, ext. n., 1 Sm. Lead. Cas. 768, 6th ed. (agent signing note without authority binds himself); Dusenbury, *sub* Sturdivant: 410; 1 Dev. Deeds, 362; Mech. Ag., Sto., Whart., Huffc., Reinh., Tiff.; Pars. Conts., Chit., Bish., 1 Rand. Com. Paper, 1 Danl., 1 Pars. N.

Cited, §§ 186, 268, 269, Hughes' Proc.
Commercial paper; power to contract by, must be expressly authorized. A power of attorney to collect debts, to execute deeds of lands, to accomplish a complete adjustment to all concerns of the constituent in a particular place, and to do all other acts which the constituent could do in person, does not authorize the giving of a note by the attorney in the name of the principal. Rossiter; Mech. Ag. 398.
Power to sell and convey excludes all other things. Hawhurst, 119 Cal. 531, 63 Am. St. 142, n.

General words, followed by special, are limited by the latter. Verba generalia. It seems that the larger power conferred by the general words must be construed with reference to the matters specially mentioned, and in this case it was held, that authority to accomplish a complete adjustment did not authorize the giving of a note on the purchase of property. Rossiter. See *Verba generalia*; Bro. Max. 649, 651. Special agent must pursue his instructions; he must act strictly within the power conferred. Rossiter; Batty; Jordan: 324.

ROUSE v. DONOVAN (1895), 104 Mich. 234, 53 Am. St. 457, n. (one entitled to notice, to an opportunity to make an issue, and to be heard upon it); Windsor: 1; Bloom: 266; Fayerweather, *sub* Res adjudicata, q. v. §§ 72, 152, Hughes' Proc.

ROUT: What is a. S. v. Sumner.

ROW v. DAWSON, *sub* Brice: 398.

ROY v. HORSLEY: L.C. 288.

ROYALL, EX PARTE (1886), 117 U. S. 241; L.C. 284. *Habeas corpus*; unconstitutional law. Circuit courts of the United States may, in their discretion, relieve one arrested under an unconstitutional law and proceedings of a state court. Brown, Jurisdic.; Howard v. Fleming, citing cases (191 U. S. 134). See Carpen, 200 U. S. 293; Pettibone. An unconstitutional law is no law. Royall, p. 248, Siebold, 100 U. S. 371, 376; Kelly: 285. See COMITY OF COURTS; SUPREME LAW OF THE LAND.
ROYCE v. GUGGENHEIM (1870), 100

Royce v. Guggenheim.—

Mass. 101, 8 Am. Rep. 322-327, 3 Gray, Cas. Prop. 375; cited, Wood, Land. & Ten. 800, 38 Am. St. 491, 1 Tay. Land. & Ten. 316, 3 Suth. Dam. 847, 848, 1 Wash. R. P. 529-531, 3 Kent, 464.
Eviction from premises; what constitutes. Edmison, 3 S. Dak. 77, 44 Am. St. 774-782, n., 17 L. R. A. 275, n.; Sully, 147 N. Y. 248, 49 Am. St. 659-664, n.; Barrett, 158 Ill. 479, 49 Am. St. 172; York, 21 Mont. 515, 43 L. R. A. 125. Moral eviction. Dyett, 8 Cow. 727, 2 Gray, Cas. Prop. 738 (reviewing 4 Cow. 431), 38 Am. St. 490, 3 Suth. Dam. 847, 848, 1 Wash. R. P. 528-532.

ROY MUST LIE PER ASCUN STATUTE, si il ne soit expressement nosme: The king is not bound by any statute, if he is not expressly named. Bro. Max. 72-75. P. v. Herkimer, 4 Cowen, 345, 15 Am. Dec. 379-383, ext. n.; Mayrhofer, 89 Cal. 110, 23 Am. St. 451, n.; C. v. Baldwin, 1 Watts (Pa.) 54; Bish. Stat. Crimes, 103; R. v. Davis (1794), 5 Term Rep. (D. & E.) 626, 2 R. R. 683, 8 Rul. Cas. 201, n.; O'Neill, 144 U. S. 323, 2 Kent, 387; S. v. Atkinson (1894), 40 S. C. 363, 42 Am. St. 877, n. (the federal constitution only applies to the states where they are named to be bound. The first ten amendments do not apply to the states, but only to the federal government and its agencies). This is a most important rule and should be considered. 2 Kent, 387. See Barron: 241.

Statutes do not bind states unless they are named to be bound. Witter, 121 Cal. 350, 66 Am. St. 33, n.; cases; Barron: 241.

State; when liable for claims and demands—wrongs. Northwestern, 18 Wash. 73, 42 L. R. A. 33-38; Houston, 98 Wis. 481, 42 L. R. A. 39-73. Counties not liable unless named to be bound, e. g., to pay interest on warrants. Seton, 34 Or. 266, 75 Am. St. 641, n.; *Ad ea frequentius*; *Expressio eorum.* See *Stare decisis*: cases.

BUCKMAN v. R. R. (1904), 45 Or. 578, 69 L. R. A. 480-483.

Res adjudicata. All that could or might have been heard is presumed to have been. Kirven. A plaintiff cannot split his grounds of recovery. U. S. v. California Land Co., 192 U. S. 355, 48 L. ed. 476, 24 S. C. R. 266 (Cal.); Perez: 2e; Kirven. Successive grounds of recovery or of defense cannot be presented in different actions.

Splitting causes of action or defenses not permissible. 192 U. S. 355, 69 L. R. A. 483.

Audi alteram partem. One not a party to a suit cannot be affected. 69 L. R. A. 483; Pennoyer: 58; cases.

RULES OF COURT: Courts have inherent powers to regulate procedure; and this power arises from organic commands to afford remedies to wronged persons according to "due process of law." *Necessitas inducit privilegium*, etc. This is the most comprehensive command in a great charter; and, by implication, great fields of law and immense details are added. Still, legislatures may unify, simplify and expedite, but if they do otherwise, if they tend to obstruct, impede, hinder and to defeat, then courts must disregard

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their acts. L.C. 222-225a. Absurdities will be excluded. *Uno absurdo dato, infinita sequuntur*. Legislatures have not all power. They cannot compel courts to write opinions or syllabi. If a statute required service of process entirely too long a time before answer, courts would disregard it. Or, if a statute dispensed with pleadings or a record, or the right to appear and be heard, or declared the conclusion of law a sufficient pleading, or that a crime need not be pleaded, described or set out upon the record, or that issues upon the record might be waived or changed, the definition of "due process of law," or of "jurisdiction," "division of state power" or of the word "jury," or constituted a court of record an inferior tribunal, or a court of errors, a court of original jurisdiction (P. v. Maynard: 143; Marbury: 142), or an inferior tribunal, or that an assignment of errors was essential for a court of errors to take notice of errors in the mandatory record (e. g., that an ambassador or a consul was a party); or, that the ground of the general demurrer could ever be waived in any court, and that the means of removal of causes, or of appellate procedure, or of *res adjudicata* (Bates: 225) or of "due process of law" should be impaired or abandoned, e. g., that notice of hearings might be dispensed with, or impaired or made impossible, or that the general issue is sufficient, or that false oaths shall not constitute perjury, or that jurisdiction attaches where there was no wronged person (*Fabula*; S. v. Baughman: 268), or where the jurisdictional averments were false (Wonderly: 102; Bro. Max. 329, n., 342, 971), or to conclusions of law (R. v. Wheatley: 19; Rushton: 5; Moore: 21; Windsor: 1), or that the benefits of abatement matter or *res adjudicata* pleas should practically be lost by ordering a hearing on the merits, and that issues upon the abatement matters be confused and jumbled with issues upon the merits; or that abatement defenses be orally presented (and consequently lost for an appellate court), such statutes should be nullified. *Audi*; Indianapolis: 223. Statutes must accord with fundamental law. Oakley: 222; Dimes: 176; Dash: 237a; Bates: 225.

And analogously, rules of court must be in harmony with fundamental law, the

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common law and also with authentic statute law. Below all these the rule of court must exist. *In præsentia majoris*. To simplify, expedite and unify, rules of court should be enacted and enforced, and especially where the general laws are inadequate and defective. And believing in the inherent power of courts, we believe that if one must state his wrong upon the record, any court may require a response upon the record, and, too, so as to limit issues and to narrow proofs, notwithstanding that in code states this would require that new matter be denied upon the record, and also that bills of particulars be afforded whenever demanded by any court (Bates: 225); and that if one sues to quiet title, a respondent setting forth his claims makes of his so-called answer a complaint, which may then be answered, and this replied to, even under codes. *Nihil simul in ventum est et perfectum; Leges non verbis sed rebus sunt impositæ; Concordare leges legibus est optimus interpretandi modus*. Bliss, Pl. 138, 141.

Rules of court. Cursus curiæ est lex curiæ. Power of courts to make. Dearing, 5 Ga. 497, 48 Am. Dec. 300, 320, n., 1 Bish. Cr. Proc. 9; S. v. Gideon (1893), 119 Mo. 94, 41 Am. St. 634, 645, ext. n.; Prindeville, 42 Ill. 217; Hudson, 156 U. S. 277; 2 Encyc. Pl. & Pr. 338; *Regulæ generales*; 11 Mews' E. C. L.; 11 Cyc. 739-744; § 214, Hughes' Proc.

The creation of a court with power to hear and decide by implication gives it power to make and supervise rules of procedure. And. Dic. 911. And the only limitation of this power is the rights of the citizen as given him by the common law and reaffirmed in constitutions—the general law. S. v. Townley: 225a; Suth. Stat. 88. *Verba fortius*.

Rules of circuit courts of appeals. 1 U. S. Cir. Ct. App. 11-35; 90 Fed. Rep. xlix-clxx; 2 Foster's Fed. Prac. 1470-1488. *Of the supreme court of the United States* (1874), 108 U. S., pp. 573-593; Garland & R. Fed. Proc., Vol. 1; 2 Post. Fed. Prac. 1421-1436; 210 U. S. 441-602.

Rules of the court are the law of the court and will be enforced. S. v. Winstandley (1898), 151 Ind. 495, 502; Ogle, 133 Ind. 55. Assignments of error must be filed in compliance with. Lathrop, 24 Colo. 382, 65 Am. St. 229. *General law: they cannot contravene*. And. Dic. 911; Bro. Max. 128. *Peremptory rule*. And. Dic. 911.

RULE OF PROPERTY: See VESTED RIGHTS; *Stare decisis*.

RUMFORD MARKET CASE: See Keech.

RUNKLE v. U. S.: L.C. 120.

RUSHTON v. ASPINALL: L.C. 5.

RUSSELL v. MANN: L.C. 87.

RUSSELL v. PLACE: L.C. 27.

RUSSELL v. SHURTLEFF (1901), 28 Colo. 414, 3 Mills, Cas., 89 Am. St. 216. Cited, §§ 21, 23, 28, 35, 51, 65, 268, 321, Hughes' Proc.; §§ 158, 199, 237, Gr. & Rud.

Russell, from a court that holds pleadings can be waived (Hume), still decides that a prayer should be technically construed, and thereby defeat the judgment resting on a sufficient statement of a

Russell v. Shurtleff.—

cause. The supposed defective prayer constituted a *coram non judice* proceeding. The court having acquired jurisdiction of the person and of the subject-matter, nevertheless lost that jurisdiction from a supposed defect found in a prayer. See Hughes' Proc. for a fuller statement of this case, also of *Rensberger*. See *Sache*.

RUSSELL v. WINNE (1868), 37 N. Y. 591-599.

Illegality of contract; void in part, void in toto. A chattel mortgage given upon some articles to hinder and defraud creditors is void as to other articles not included within that intention. A mortgage void in part under a statute is void in toto, whether of realty or personalty. 37 N. Y. 596: cases; *Wilson v. Voight* (1886), 9 Colo. 614, 619: *contra* cases; *Utile per inutile*.

On principle a contract may be valid in part. *Pigot's Case; Ut res.*

RUSTIN v. MERCHANTS' Co.: L.C. 134. **RYALL v. ROWLES**: L.C. 397.

RYDER v. WOMBWELL, sub *Bonnell*: 185. *NECESSARIES*; *Peters v. Fleming*.

SACHE v. WALLACE (1907), 101 Minn. 169, 112 N. W. 386, 118 Am. St. 612, n. *Cites* *Munday*: 79; *Reynolds*: 79a.

Jurisdiction; elements of; pleadings limit. There must be jurisdiction of subject-matter of the person, *Omaha*, 73 Neb. 351, 119 Am. St. 903; *Pennoyer*: 58; also a description of the particular matter. *Saunderson v. Wisconsin Co.*; *Munday*: 79: cases; *Fish*: 12c; *CODES*; *Haddock*; *Draper*; *Ruckman*. See *JURISDICTION*; *SERVICE OF PROCESS*.

Judgment in excess of jurisdiction is void and is subject to collateral attack. See *Res adjudicata*; *Coram judice*.

All relief granted must be within the facts stated, and consistent with the issues formed. The court is bound by its record. § 126, Gr. & Rud. See *JURISDICTION*.

Jurisdiction to enter particular judgment is essential. *Russell* (Colo.). See 2 *Thomp. Tri.*, §§ 2310, 2311; 1 *Bates' Pleading, Practice, Parties and Forms*, 511, 512 (pleadings may be waived).

SAINT HELEN'S SMELTING CO. v. Tipping (1865), 1 H. L. Cas. 642, 4 B. & S. 303 (116 E. C. L. R.), *Bigl. L. C. Torts*, 464, *Chase, Cas. Torts*, 168, *Cool.*, *Bish.*, 1 *Add.*; 11 *Mor. Min. Rep.* 50, 5 *Am. Law Reg.* (N. S.) 104, 3 *Gray, Cas. Prop.* 52; S. C. *Nom. Tipping v. St. H. Co.*, L. R. 1 Ch. 66, *Mews' E. C. L.*, 1 *High, Injunc.* 641, 1 *Thomp. Neg.*: cases; *Wood, Nuis.*, *Bisph. Eq.*, 9 L. R. A. 711, 56 *Am. Dec.* 95, *Moak, Torts*, 415-417; stated in *Fletcher v. Rylands*; *Frost*, 42 S. C. 402, 46 *Am. St.* 736, 26 L. R. A. 693, 3 *Kent*, 448, 3 *Suth. Dam.* 1037, 2 *Beach, Eq., Bro. Max.* 373, 379, 221, 294, 55 *Conn.* 34, 3 *Am. St.* 20, 1 *Dill. Corp.* 374, 2 *Gr. Ev.* 467.

St. Helen's stated: Coming to a nuisance makes no difference. The company operated smelters, and T. bought property adjacent to these and set out shrubbery, trees and vegetation, all of which were damaged by the fumes from the works. T. by injunction restrained the company from allowing the noxious fumes to escape. See *Edwards*: 282; *Sic utere*; *Volenti*; *Squib Case*; *Fertilizing Co. v. Georgia v. Tennessee Co.* (1907), 207 U. S. 230.

Saint Helen's.—

Prescription; user. Acquiescence gives no right for the continuance of a nuisance. *P. v. Cunningham*; *Susquehanna Fertilizer Co.*, 73 Md. 268, 9 L. R. A. 737, n.; 25 *Am. St.* 595 (noxious fumes, etc.); *Euler*, 75 Md. 616, 32 *Am. St.* 420, n.; *Fort Worth*, 74 Tex. 404, 15 *Am. St.* 840, n., 3 *Kent*, 448 (right to pure air).

Lapse of time will not bar the right to complain of a nuisance. *Mathews*, 63 Minn. 493; *St. Louis*, 141 Mo. 375, 39 L. R. A. 551, ext. n.; *Georgia, supra*.

Smoke, noxious vapors and smells. *Wood, Nuis.* 429-574, 2 *Add. Torts*, 217-518, *Cool. Torts*, 670-750; *Fertilizing Co.* See *NUISANCE*.

Noise; offensive occupation; physical discomfort. *Froelicher*, 111 La. 705, 64 L. R. A. 228: cases; *Sic utere*.

ST. LOUIS BEEF CO. v. CASUALTY Co. (1906), 201 U. S. 173.

Contract; renunciation of; effect. One renouncing a stipulation or a duty or a privilege under a contract renounces all collateral or reciprocal or dependent rights arising therefrom. *Nullus commodum capere*; *Norrington*.

Whatever was necessarily and fairly contemplated will be interpreted into a compact. *Robinson*: 309; *Expressio eorum*; *Lex non exacte*.

Contracts are construed in the light of reason and what the parties intended. What they intended may be determined from their conduct as well as from the words they employed. Acts speak as plainly as words. *Res ipsa loquitur*; *Verba intentione debent inservire*. *Rodriguez v. Vinona*; *S. v. Bolden*: 216.

One liable over must defend a suit when notified and called upon or else abide the natural, direct and probable results of his acts. *Lovejoy*: 289. An insurance company liable over for damages as may appear from a final judgment must defend the suit if notified and called upon or else be liable for the amount required to settle the claim for damages. Vain and fruitless things are not required. *Lex neminem cogit ad vana*.

SALE: *Essentials of.* *Tarling v. Baxter*, L. C. 404: cases. See *CONTRACTS*: L.C. 301-416.

Fraud; deceit in. *Pasley*: 375; *Chandelor*: 374: cases; *Laidlaw*; *Whitworth*.

Of real estate. Caveat emptor; *Harris*: 380. See *REAL ESTATE*.

Mistake will avoid contract of. *Brown, Kyle and Wheadon*: L.C. 347-349.

Of thing not in esse; there can be no sale of. §§ 114, 133, *Hughes, Conts.* A thing in esse is an implied warranty. § 134, *Hughes, Conts.*

Implied warranty of fitness. *Beggs*, 27 R. I. 62, 114 *Am. St.* 44. See *Caveat emptor*.

Payment must be made unless waived before title passes. *Wilson*, 125 Ga. 500, 114 *Am. St.* 245; *Non hæc*.

Intention not to pay, no title passes, owner may rescind. *Pelham*, 146 Ala. 216, 119 *Am. St.* 19 n.; *Non hæc*.

And that it is genuine, and a subsisting demand. An "indorsement without recourse" nevertheless implies that the note is genuine and is unpaid. § 134, *Hughes, Conts.* When title passes. § 135, *Hughes, Conts.*

Of land under statutory powers must be upon strict compliance with law. *Bloom*: 286; *Williams*: 116; *Thatcher*: 117; *Cooper v. Reynolds*; *Mohr*: 68.

Statute of frauds; requirements. See *Id.* Of goods, if executed, operates as a conveyance. *Ans. Conts.* 65.

Sale.

Executed and executory. Ans. Conts. 13, 65, 66, 294, 295. Executory contract for sale within statute of frauds. Ans. Conts. 66. Contract of sale, how different from contract for work and labor. Ans. Conts. 67; Lee v. Griffin: 338. Mistake, how affects. Ans. Conts. 125, 164, 205.

Vendor not bound to inform purchaser of defects. Ans. Conts. 131-133, 154, 155; Chandelor: 374; Pasley: 375; *Caveat emptor.*

Rights of third persons not affected by fraud of their predecessor in title. Ans. Conts. 163, 205. *See* Le Neve: 396; Swift.

Specific performance of, not granted. Ans. Conts. 313; Pusey: 276.

Of land; agreement for sale of land a contract uberrima fides. Ans. Conts. 150. *See* *Caveat emptor.*

Specific performance of agreement to sell. Ans. Conts. 313. Damages for breach of contract on sale of an article. Huyett Co., 129 N. C. 438, 57 L. R. A. 193-267, ext. n.

Contract to borrow of only one person to pay with is void. Union Ins. Co., 11 Okla. 184, 55 L. R. A. 109: cases.

Sales under trust deeds, and mortgages with power of sale. Sub Keech: 92 Am. St. 565-597, ext. n.

Exchange of property. 17 Cyc. 829-847.

Conditional sale. What transaction constitutes. Fleet, 201 Ill. 594, 94 Am. St. 192-258, ext. n. *See* *CONDITIONAL SALES.*

Generally: Mechem, Sales; Benj.; 2 Bouv. 943-948; And. Dic. 914-919. *See* *CONTRACTS.*

SALISBURY V. HERCHENRODER (1871), 106 Mass. 458, 8 Am. Rep. 354, 2 Thomp. Neg. 1067-1101, ext. n., Smith, Cas. Torts, 67, Bish. Torts, Whart. Neg.; Gilson v. Delaware; 18 Rul. Cas. 736; Dill. Corp. *See* *TORTS.* § 347, Hughes Proc.; § 296, Gr. & Rud.

Concurrence of unlawful act with extraordinary and unforeseen cause is actionable. Vaughan, 3 Bing. N. C. 468-477 (32 E. C. L. R.), 4 Scott, 244, 3 Hodges, 51, 18 Rul. Cas. 715, n., 43 R. R. 711; Smith, Cas. Torts, 139 (spontaneous ignition of hay rick built too near plaintiff's house). Railroad train illegally running not liable for collision if other party contributed. Jackson, 157 Mo. 621, 80 Am. St. 650; Daly v. R. R. (1903), 119 Wis. 398 (liable if illegally running cars, although not negligent).

Selling gunpowder to an infant eight years old, who injures himself with it, renders the seller liable. *Carter v. Towne* (1868), 98 Mass. 567, 96 Am. Dec. 682; Burdick, Torts, 354. Driving a horse in a highway, which runs away and causes damage, is not *per se* actionable. Brown, sub Fletcher v. Rylands (able discussion of obligations springing from the social state), and relating to *Sic utere*.

Vis major is excuse for a lesser wrongful act, when the greater will stand for the entire wrong. Southern Ry. Co., 116 Ga. 152, 59 L. R. A. 109; 98 Wis. 624; Rodgers. *See* *NEGLIGENCE.*

One using a street for his own purposes, like hanging an awning in it, and thereby causing an injury is guilty of negligence, and there applies to him *Res ipsa loquitur*. Waller v. Ross (1907), 100 Minn. 7, 12 L. R. A. (N. S.) 478.

SALT LAKE V. HOLLISTER (1886), 118 U. S. 256, 30 L. ed. 176, 6 Sup. Ct. Rep. 1055, 1 Dill. Corp. 457, 973a, 1 Beach, Corp. 594, 756; 2 Beach Conts. 1201.

Salt Lake v. Hollister.

Municipal corporations; ultra vires acts.

The city without authority—charter or statute,—invested in a distillery and ran it and made false returns to escape paying the government tax. However, it was duly assessed and the tax was paid by the city, under protest. It then sought to recover this tax upon the ground of *ultra vires*—that the city had no authority to engage in the business. *Held*, that the city was liable. *Respondent superior; Qui sentit.* *Ultra vires* applies to a public as to a private corporation, but more consideration is given the public.

2 Beach, Conts. 963-1231. Agents; liability of towns for acts of. Clark v. Des Moines; Loan Ass'n. Indemnifying officers; lack of interest is a lack of power. Loan Ass'n; 1 Dill. Corp. 147, 148, 447; 1 Beach, Corp. 647, 648. Limitations of indebtedness must not be exceeded. Beard. *See* Hitchcock v. Galveston.

SALUS POPULI SUPREMA LEX: That regard be had for the public welfare is the highest law. Bro. Max. 1-10. *See* *POLICE POWER*; West R. Bridge Co. v. Dix (1848), 6 How. 507; 35 Wis. 569 (R. R. cases).

Cited, §§ 13, 20, 21, 22, 25, 26, 28, 29, 44, 79, 99, 101, 109, 122, 166, 169, 169a, 188, 214a, 298, 300, 305, Hughes' Proc. *Cited*, §§ 46, 47, 50, 56, 60, 100, 108, 109, 147, 149, 157, 190, 206, 225, 268, 284, 293, 295, Gr. & Rud.

COGNATE MAXIMS: *Juris præcepta sunt hæc, honeste vivere, alterum non lædere, suum cuique tribuere; Necessitas inducit privilegium quoad jura privata; Summa ratio est quæ pro religione facit; In pari delicto; Sic utere tuo ut alienum non lædas; Jurisdictio est potestas.*

CASES: West River Bridge Co. v. Dix (1848), 6 How. 507; 35 Wis. 569 (R. R. cases); S. v. Hay (1900), 126 N. C. 999, 78 Am. St. 691; Kansas v. Colo. (1907), 206 U. S. 46-118; Ellis v. U. S., *id.* 246 (contract to work nine hours a crime).

This maxim is from the Roman.

Howe's Civil Law, 172-174. It was the

first law written upon the twelve Tables.

It is the motto of the state of Missouri.

It is a ground and rudiment of law, and

is a most important datum post. Osgood.

Construction is for the usefulness and per-

petuity of government. Trist: 214; Hollis-

ter: 354 (one cannot contract for immu-

nity from his own fraud, wanton acts, and

gross negligence). §§ 3, 18, Hughes'

Conts.; Mitchel: 372; Mallan: 373 (con-

tracts in restraint of trade are strictly

construed and are closely guarded for con-

sideration of the public welfare); Sturdi-

vant: 410; Crooker (commercial paper

construed for the public welfare); Dickin-

son v. Johnson (officers cannot assign

their salaries); Good: 358 (wager con-

tracts void if they oppose public policy);

Coggs: 350 (volunteer services require

diligence for the public welfare); Keech

(one in a trust relation cannot contract

in the subject of his trust; for the public

welfare fraud is restrained); Wonderly:

102 (false and sham allegations will not

confer jurisdiction upon a court); Graver:

103 (sham and false denials will vitiate

any advantage secured in judicial pro-

cedure thereby); S. v. Baughman: 268

(sham and moot cases do not constitute

coram judice proceedings); Rushton: 5;

R. v. Wheatley: 19; Garland: 60; Porter:

2 (essential matters of procedure are

guarded by courts *sua sponte*). For pro-

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tection, the mandatory record must exist. Evidence excluded from public policy. See PRIVILEGED COMMUNICATIONS.

In all relations, when the interests of the crown—state, government—have to be considered, there is involved *Salus populi suprema lex*. In procedure, the mandatory requirements of a constitutionalism are of public concern; these cannot be waived. §§ 59-61, Gr. & Rud. These views, while very important, are often overlooked. See THEORY OF THE CASE; VARIANCE; WAIVER; *Verba fortius*.

In contract law two cannot contract and bind a third. *Res inter alios*; *Id quod nostrum*; *Pacta*; *Jus publicum*. The necessities of government must ever be respected; these cannot be waived. See WAIVER.

One must look after and secure and properly evince essential things in judicial procedure, and secure his judgment decrees and all claims and rights founded upon record matter from collateral attack. Iversile: 46. See PLEADINGS; PROCEDURE.

All records must exist and be sufficient for the conserving principles of procedure, or they are subject to collateral attack. Public policy thus demands records and therefore they can not be waived. Dennett: 145; Flournoy: 146 (the division of state power is created and ordained for protection—the public welfare—and therefore its requirements cannot be waived nor dispensed with); Hunsaker: 259 (sovereignty cannot be sued against its consent); Hill v. Boston; Tiede, Police Power, 1 (the subdivisions of sovereignty, such as towns, counties and other governmental agencies, are not liable for negligence, for reasons of public policy). *S. v. Hay* (1900), 126 N. C. 999, 78 Am. St. 691 (instructive review of the maxim). It should also be considered with *Ignorantia legis neminem excusat*, which often appears as an important part of *Salus*, etc. *Interest reipublice*, etc., is a part of *Salus*, etc. See *Res adjudicata*. Procedure is required by, as already noticed. See COLLATERAL ATTACK; *Coram judice*; CONSTRUCTIVE NOTICE; Windsor: 1. The mandatory record is demanded, for reasons discoverable in public policy. Windsor: 1; *Coram judice*; LITERATURE.

Contracts are greatly affected by *Salus*, etc. See Greenh. Pub. Pol.; *In pari delicto*, etc.; ILLEGALITY; POLICE POWER; Keech.

Common carriers are greatly restricted by principle of. The *Caledonia*, 157 U. S. 144, quoting from Coggs: 350. The carrier's attempt to limit its liability is greatly restricted. *Cherry v. C. & A. R. R.*; *R. R. v. Lockwood*: 352.

Agency and contracts relating to, are also much affected by. See *Qui sentit commodum*; this also includes partners. The implied agency of the infant or of the wife to bind the husband for necessities arises from public policy. See INFANTS; HUSBAND AND WIFE.

For reasons of *Salus*, etc., the wager upon the sex of a third person is invalid. *Da Costa*: 361; 4 Wigm. 2180. Wagers at common law were valid, but not if against public policy. The means of proving the sex of a third person would be indecent and against good morals, the dignity and usefulness of courts. Here is an illustration of how the remedy affects the right. Champertous contracts of attorneys void. *Ingersoll*, 117 Tenn. 263, 119 Am. St. 1003-1041, ext. n.

Within strict limitations one may redress his own wrongs, e. g., a landlord may

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take possession of leased premises, if he can do so without a breach of the peace. *Taylor v. Cole*; *Stearns v. Sampson* (1871), 59 Me. 568, 8 Am. Rep. 442, Ames, Cas. Torts, 11, Cool. Torts, 381, 1 Wat. Tres. 142, Bro. Max. 440, 441; *Allen v. Kelly* (1892), 17 R. I. 731; *Harvey v. Brydges*. *Contra* cases: 39 L. R. A. 410, 415, 418; Tiede. Pol. Power; 105 Mo. App. 248. One may employ the right of self-defense. U. S. v. Holmes; *Necessitas inducit*.

Forcible trespass; one entitled to possession of personal property cannot take it forcibly from another. *Stanley*, 78 Vt. 235, 112 Am. St. 911; *S. v. Thompson* (1807), 2 Overton 96; cases, 2 Bish. C. L. 517, 520, 536, 2 Wat. Tres. 804; 1 Add. Torts, 523; C. v. Donahue (1889), 148 Mass. 529, 12 Am. St. 591, n. (reception of personal property by force). See *Stuyvesant*, 92 Mich. 233, 31 Am. St. 580, n. Moak, Torts, 361; cases; *id.* 605; Huppert, 27 Wis. 365; Kirby, 17 R. I. 437, 14 L. R. A. 317, n.; Green: 90; Bro. Max. 278, 441; *S. v. Black* (1891), 109 N. C. 856, 14 L. R. A. 205, n. 2 Bish. Cr. Proc. 389-395. A lawful act cannot be done illegally. *Ilsey*: 169; Dunlap: 168; *Semayne's Case*.

An officer cannot levy on a watch on the person, because of the tendency to disturb the public peace. 1 Wat. Tres. 448, n.; *Mack v. Parks* (1857), 8 Gray (Mass.), 517, 69 Am. Dec. 267-270; stated, 1 Wat. Tres. 448; *Taylor v. Cole*; Green: 90. And arrests must be made according to law. *Allen*: 167; cases; Wat. Tres. 315; cases; *John Bad Elk* (1900), 177 U. S. 529; *Semayne's Case*, Smith, Lead. Cas.; 61 Am. Dec. 147-161; *Holker*, 141 Mo. 527, 64 Am. Dec. 524, n., 39 L. R. A. 165, Bro. Max. 278.

Jurisdiction is vested for reasons of public policy, and this is the foundation of the rule that consent will not confer jurisdiction of subject-matter. *Jurisdiction est potestas*, etc. And the safeguard of protection of this is found in the reason and uses of collateral attack and motions in arrests of judgment, and why the ground of the general demurrer is never waived, but forever searches the common-law record and attaches to the first substantial fault found in it. *Campbell*: 2. See JURISDICTION; PLEADINGS; PROCEDURE; WAIVER.

This principle is so important to the practitioner that he should fully comprehend the views offered from estoppel and collateral attack. §§ 171-261, Gr. & Rud.

Expressio unius, etc., is also a part of *Salus*, etc., which of course involves the rule excluding oral evidence. See ORAL EVIDENCE.

Parties cannot contract in forbidden relations; they cannot contract for iniquity, fraud, illegality, or crime. Public policy fixes a limit to lawful contracting. *Salus*; *Pacta*. §§ 14, 18, Hughes' Conts.

An agency cannot extend to the commission of a criminal act, for reasons of public policy. *Salus*; *Poulton*.

The mandatory requirements of a constitutionalism cannot be waived. §§ 59-61, Gr. & Rud. Nothing relating to the nature and structure of government can be contracted or stipulated away or waived. See MANDATORY RECORD: §§ 171-261, Vol. I.

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Parties cannot contract a procedure for themselves beyond those barriers raised by public policy, such as the division of state power, and how and when jurisdiction is vested, and how it may be exercised. Public policy fixes the boundary of jurisdiction.

Legislatures cannot prescribe a procedure in disregard of the barriers for protection, erected by public policy for the public welfare, for reasons of Salus populi, etc. Campbell: 2a; Sache.

In the above postulates is mentioned a barrier bounding contracts and agency and regulating procedure and legislative interference with due process of law. Concerning all these matters are limits, and these limits are fixed by public policy, and here it should be observed that the barrier in each case is identically the same. Substantially it must be; therefore appear most instructive views from which much may be deduced. Anyway there will arise many suggestions of limitations of the power to contract, and consequently of waiver (Osgood v. R. R.), and that what is a subject of waiver is a subject of contract and also of legislative regulation and control in a plenary way.

See POLICE POWER; WAIVER; PLEADINGS; MAXIMS; *Verba fortius, etc.*; *Quod ab initio*.

No one has a right to derive a private benefit or advancement at the expense and to the detriment of the whole public. For the public good private interests and privileges must be forsaken. This principle was well understood by Leonidas, whose epitaph was said to be:

"Go tell the Spartans, thou that passest by, That in obedience to their laws here we lie."

It was also well expressed by Demosthenes when speaking of the duty of Athens. Of Chæronea, referring to it as an unspeakable disaster, he said:

"I say that if the event had been manifest to the whole world beforehand, not even then ought Athens to have forsaken this cause, if Athens had any regard for her glory, or for her past, or for the ages to come." See *Verba fortius*.

SANBORN v. SANBORN: L.C. 61.
SANFORD v. EDWARDS (1896), 19 Mont. 56, 61 Am. St. 482-496, ext. n. Process; service of summons; statutes providing for are mandatory. Delivery of summons to a defendant is not equivalent to reading it to him, nor delivering it at his place of residence.

Oral evidence inadmissible to aid or subtract from what the mandatory record shows. Mondel: 77; Hauswirth: 51; Fayerweather, *sub Res adjudicata*; ORAL EVIDENCE. See Harrow v. Grogan. Jurisdic-

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tion; defects in the service of process. 61 Am. St. 485-496; Ald. Jud. Writs. A justice cannot serve his own. See DIVISION OF STATE POWER. Keech. Full appearance waives process. See ABATEMENT; Thomas v. Citizens' R. R.

SAN FRANCISCO GAS CO. v. SAN Francisco (1858), 9 Cal. 453, 475. Denials must be specific and certain. Dickson: 34; Doll.

SANITY: Is presumed. C. v. York: 197; Looffner; CONTINUITY.

SASPORTAS v. JENNINGS (1795), 1 Bay (S. C.), 470, Ewell, L. C. Inf. 782, 28 Am. Dec. 377, 2 Gr. Ev. 301, 302, 1 Danl. Nego. Insts. 857, 1 Pars. Conts. 431, 432, 1 Chit. 271, Bish. 724. Cited, §65, Hughes, Conts.; Whart. Conts. 149, 739. Cited, § 296, Gr. & Rud.

Duress; wherever assumpsit will lie for a return of money obtained by compulsion, duress is a defense. Guetzkow, 96 Wis. 591, 65 Am. St. 83, n.; Williams, L. R. 1 Hou. L. Cas. 200-222, 6 Rul. Cas. 455, Bro. Max. 275-277; stated, 23 Utah, 120, 90 Am. St. 697. See *Necessitas*.

A contract by one in order to regain his goods unlawfully withheld is without consideration, and is void. Fink, 170 Pa. 124, 50 Am. St. 750, Chit. Conts. 51, Add. 13; Lafayette R. R. v. Pattison (1872), 41 Ind. 312; stated, Peters v. R. R. (1884), 42 Ohio St. 275, 51 Am. Rep. 814, n.; Spaid v. Barrett (1870), 57 Ill. 290, 11 Am. Rep. 10, 2 Gr. Ev. 301, Bish. Torts. 243, Ans. Conts. 164, 2 Wh. Ev. 931, 79 Tex. 548. See Watkins v. Baird; DURESS; VOLUNTARY PAYMENTS; Bro. Max. 275-277; Whart. Conts. 451a. See ASSENT.

Assumpsit will lie for money obtained for duress of goods. Astley v. Reynolds (1731), 2 Strange, 915; 2 Barnard (K. B.) 40, Ewell, L. C. Inf. 773, n., 2 Chit. Conts. 939, 941, Whart. 149, 1 Pars. 431, 432, 20 Colo. 20, 7 Am. St. 207, 15 L. R. A. 481, 2 Gr. Ev. 121, 3 id. 290, 2 Pom. Eq. 940, 1 Sto. Eq. 298; Oliphant, 79 Tex. 543, 550, citing Sasportas; Olivari, 39 Tex. 76 (plea that "great violence was threatened" is insufficient); Whart. Conts. 144.

Consent obtained by duress is inoperative; privies may set up the defense; danger must be real; violence must be threatened; duress of goods insufficient. Whart. Conts. 149. See Sasportas. Fear of legal proceedings insufficient. Threats of criminal proceedings of promisor or near relations, by promisee or third persons will avoid a promise. Such contracts may be ratified. Whart. Conts. 154; Collins v. Biantern.

SATISFACTION: See ACCORD AND SATISFACTION; Cumber: 311.

SATISFACTION SHOULD BE MADE to that fund which has sustained the loss. 4 Bouvier, Inst. n. 3731. *Qui sentit commodum; Secundum naturam, etc.*

SATIUS (MELIUS) EST PETERE fontes quam sectari rivulos: It is better to seek the fountain than to follow the rivulets. 10 Coke, 118. See *Melius*. It is better to drink at the fountain than to sip in the streams. Origins should be sought. Armory: 180; 65 L. R. A. 237. See *Melius*.

SAUNDERSON v. HERMAN (1897), 95 Wis. 51, citing Iversille: 46. § 245, Hughes' Proc.

Frustra probatur quod probatum non relevat. An essential pleading like an answer cannot be dispensed with. Evidence will not supply it. What ought to be of record must be proved by record and by the right record. Iversille: 46; Borkenhagen:

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81; Adams v. Gill; Farnam: 97; Harrison v. Nixon, sub Garland: 60: cited, 195 U. S. 133; Sache.

Defenses not pleaded are waived. Cromwell: 26; Field: 84; 1 Best, Ev. 252. See WAIVER; PLEADINGS; PROCEDURE.

SAVACOO V. BOUGHTEN: L.C. 164.

SCANDAL IN PLEADINGS: 2 Bouv. Dic. Remedies for. Sto. Pl. 266, 270, 867. *Defamation in judicial proceedings.* Hastings: 160.

SCANDALOUS MATTER: Striking of. 11 Mews' E. C. L. 908; Sto. Pl. 48 n. 268.

SCHICK V. U. S. (1904), 195 U. S. 65-100. Guaranty of right to jury trial does not extend to misdemeanors. "All criminal offences" is not so broad in its meaning as "all crimes." See this case quoted, sub *Verba intentione*, etc. §§ 89, 90, Hughes' Proc.

Work v. S.: 242; stated and discussed, 195 U. S. 65-100.

Right to trial by jury cannot be waived. U. S. v. Taylor (1882), 11 Fed. 470; quoted, 195 U. S. 92. See U. S. v. Anthony; stated, 11 Fed. 471. See also Turney v. Barr.

SCHNEIDER V. MORRIS (1814), 2 M. & S. 286, Smith, Conts. 93. Cited, § 32, Hughes, Conts. What is a sufficient signature under the Statute of Frauds. Smith, 93. Brown: 346.

SCHOOL DISTRICT V. MCCOMB (1893), 18 Colo. 240. Admissions of facts upon the record proper are conclusive. Bradbury: 35; Crater; Cothran. And proof of same is surplusage. Shutte: 291.

SCHOOL DISTRICT V. MERCER (1887), 115 Pa. 559, 9 Atl. 64. Statutory designation of evidence is exclusive. Corporations, both public and quasi public, must contract in the manner prescribed by statute; and their proceedings must be evidenced by their records, and under seal, if required. Montgomery: 47; Iversite: 46; Jordan v. School District (1854), 38 Me. 164. And of executed contracts and where the corporation has received the benefit of the contract. Hunt v. Wimbeldon Local Board (1878), 1 C. P. D. 208-215, 4 C. P. D. 48-62, 16 Rul. Cas. 237, n., 1 Dill. Corp. 301: cases.

SCHUCHARDT V. ALLENS (1863), 1 Wall. 359-371. *Chandelor*: 374, stated and approved (*Simplex commendatio*, discussed). Agency; authority without restriction to an agent to sell carries with it authority to warrant. *Expressio eorum. Sale; added terms.* Vendor cannot tack on additional terms to a completed sale, by sending with the goods a notice of limitation of time in which to object to the goods, as that "no claims for deficiencies or imperfections will be allowed, unless made within seven days from the receipt of the goods." Jordan: 324; Hogins: 379; *Non hæc*.

Ad questionem facti; province of court and jury. In a civil case, where the evidence or any part of it, if believed by the jury, is decisive of the case, it is proper for the court to instruct the jury to that effect. 1 Wall. 370; McAfee; Bonnell: 185. See S. v. Crotean: 271.

SCIENTER: See MALICE; MOTIVE; INTENT. It need not be alleged in case of false warranty. Tyler, 111 Ky. 191, 54 L. R. A. 417, sub Scott v. Shepherd. Cf. Pasley: 375; 1 Chit. Pl. 378; Wiedeman, 171 Ill. 93. See 2 Bouv. Dic.; KNOWLEDGE; PRIVACY; Woodward v. Miller (privacy).

SCIRE FACIAS: To revive judgment. Frierson, 5 Cold. 146, 148, 94 Am. Dec.

Scire Facias.—

220-246, ext. n.; Haupt, 21 Mont. 572, 69 Am. St. 698.

SCIRE LEGES NON HOC EST VERBA earum tenere, sed vim et potestatem: To know the laws is not to observe their mere words, but their force and power. Dig. 1, 3, 17; *Scire proprie*, etc.: 1 Kent, 462; *Scientia scilorum*, etc.; Hurtado: 220; *Nil facit error nominis; Concordare; Lex non exacte; Præsentia corporis.* "The letter killeth, but the spirit killeth the law."

SCIRE PROPRIE EST REM RATIONE et per causam cognoscere: To know properly is to know a thing by its cause and in its reason. See *Scire leges*, etc.; *Nimia subtilitas*, etc.; REASON; *Cessante ratione; Melius; Satius.*

SCOTT V. AVERY, sub *Lex non cogit ad impossibilia*; Cutter: 308. See AWARDS; 9 Cyc. 511-514.

Cited, §§ 158, 297, 300, 304, Hughes' Proc. *Conclusiveness of decisions of tribunals of associations or corporations.* Ryan v. Cudahy (1895), 157 Ill. 108, 49 L. R. A. 353-403, ext. n. See *Consensus*.

Contract methods for ascertainment of damages. 3 Suth. Dam. 808.

SCOTT V. FORD (1904), 45 Or. 531, 68 L. R. A. 469-477, n. Cited, § 306, Gr. & Rud.

Voluntary payments of money under mistake of law cannot be recovered in the absence of fraud, deceit or undue influence. Ignorantia facti excusat; Ignorantia juris non excusat (ignorance of fact excuses; ignorance of law does not excuse) and *Volenti non fit injuria* cited and discussed, also *Bilbie v. Lumley*, *Lawnstown*, and other English and American cases.

This case well illustrates how maxims and old cases guide. Rodgers; see MIS-SOURI.

SCOTT V. McNEAL (1894), 154 U. S. 34, 38 L. ed. 896, 14 S. C. 1108.

Due process of law. Statutes can not authorize administration upon the estate of absent persons supposed to be dead. Springer: 24; Thomas v. P. (1883), 107 Ill. 517, 47 Am. Rep. 458; Mella v. Simmons (1878), 45 Wis. 334, 30 Am. Rep. 746; Carr v. Brown (1897), 20 R. I. 215, 78 Am. St. 855, 38 L. R. A. 294; Clapp v. Houg (1904), 12 N. D. 600, 65 L. R. A. 757: cases.

Causes of action cannot be created by statute, or fictitiously. Fabula; Seabury: 281; Weltmer: 268a. See Rensberger; CAUSE OF ACTION.

There are limitations of legislative authority. Penoyer: 58; 204 U. S. 15; Seidens, 104 Va. 826, 113 Am. St. 1076-1080.

SCOTT V. SHEPHERD (Squib Case) (1773), 2 Wm. Bl. 892, 3 Wills. 403, 1 Sm. L. C. 796-809, n., 8th ed., 11th ed. (reviews English cases); Smith, Cas. Torts, 8; Gt. Opin. Gt. Judges, 116; 14 Mews' E. C. L. 224; 1 Suth. Dam. 40; 1 Sedgk. Dam. 115; 143 N. Y. 478; 17 L. R. A. 33; 18 id. 388, Shir. L. C. 259; Laws. L. C. Simp. 240; Cool. Torts; Bish. 45; 1 Add. 3, 14; 1 Wat. Tres. 20, 21; Wood, Nuis. 143; Whart. Neg. 95; 1 Chit. Pl. (128) 142; quoted, 13 Cyc. 25; Gilson v. Delaware; Laidlaw v. Sage; Brown v. R. R., 54 Wis. 342; *Guille v. Swan*; *Vandenburgh v. Truax*, 36 Am. St. 841, 848; *Bradley v. Andrews* (1879), 51 Vt. 530; Crowley, 183 N. Y. 353, 3 L. R. A. (N. S.) 330-332.

Cited, pp. 26, 36, 39; §§ 5, 20, 42, 219, 238, 239, 269, 342, 343, 345, 348, Hughes' Proc.; cited, Preface, also §§ 8, 46, 49, 55, 67-71, 180, 198, 255, 272, 293-295, 296, 304, 308, Gr. & Rud.

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COGNATE AND LEADING CASES; MAXIMS: *In jure non remota*; *Nullus commodum capere*; *Qui primum peccat*; *Sic utere tuo*; *Volenti non fit injuria*; *Fletcher v. Rylands*; *St. Helen's Co. v. Tipping*; *Thomas v. Winchester*; *May v. Burdett*; *Hay v. Cohoes Co.*; *Lickbarrow v. Mason*: 394; *Stetson v. Kempton*: 163; *Crepps v. Durdan*: 113; *Graver v. Faurot*: 103; *C. v. York*: 197; *Hadley v. Bozendale*; *Le Blanche v. London R. R.*; *Denton v. R. R.*; *Fent v. R. R.*; *Vandenburgh v. Truax*; *Guille v. Swan*; *Vosburgh v. Moak*; *Gibney v. S.*; *De Crespigny v. Wellesley* (repeating defamation); *Dixon v. Bell* (negligent agent); *Aldrich v. Wright* (self-defense); *Carter v. Towne*; *Lynch v. Nurdin*; *Robinson v. Cone*; *Hartfield v. Roper* (injuring child); *Waite v. N. E. R. R.* (imputed negligence); *Phila. R. R. v. Hummel* (child on R. R. track); *Sweeney v. Old Colony R. R.* (crossing R. R. track—"Stop, look and listen"—*sub Davies v. Mann*).

Scott stated: Shepherd, boy-like, at a fair, lighted and threw a squib upon the stand of Yates, who was selling gingerbread. A bystander, one Willis, to protect himself and the stand of Yates, seized and threw the squib and it fell on one Ryal's hand, who threw it, striking Scott, another boy, in the face, exploding and knocking out his eye. Scott sued Shepherd and recovered upon the fundamental principle that one is presumed to intend the natural, direct and probable consequences of his act. 164 U. S. 496; 1 Suth. Dam. 16. No case better presents that principle which pervades so many subjects. *In jure non remota*; *Nullus commodum capere*; *Qui primum peccat ille facit rixam*. See NEGLIGENCE.

Blackstone dissented, and upon the ground that Scott was liable to Yates, and Willis to Ryal, and he to Scott. His reasoning denies the great fundamental idea involved. See Article BLACKSTONE, Encyc. Brit, 9th ed., Edinburgh, 1873, and also why a multiplicity of suits is to be avoided.

Laidlaw v. Sage (1899), 158 N. Y. 73, 44 L. R. A. 216: cases (one shielding himself from a bursting bomb with the body of another is not liable). This case quotes and follows the "*Squib Case*." S. P., *Cleveland v. Osborn* (1902), 66 Ohio, 45; *Stokes*: 207; *Necessitas inducit privilegium*.

A seller of stove polish, representing that it is for use on hot stoves, upon which it explodes, is liable to the person injured thereby, although not the buyer. *Cunningham*, —N. H.—, 69 Atl. 120, 66 Cent. L. J. 461.

One who sets a noxious or dangerous thing in motion is presumed to intend the natural, direct and probable consequences of his act, is one of the greatest principles of the law. *Scott*; *McCardle*; *Hazen*, 70 Vt. 543, 67 Am. St. 680, n. As where one impounds water in a reservoir, *Fletcher v. Rylands*; or allows fumes to escape from chimneys, *St. Helen's Smelting Co.*; or putting a harmless label on a poisonous drug, *Thomas v. Winchester*; or keeping ferocious animals, *May v. Burdett*; electrical wires, *sub Fletcher v. Rylands*; or blasting rocks, *Hay v. Cohoes Co.*; or falling snow or ice from eaves upon walks, *Shipley v. Fifty Associates*;

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or uttering deceitful words, *Pasley*: 375; or defamation, *Harrison v. Bush*; *Hamline*, 118 Wis. 594 (slander); or if one wrongfully stops the inlet of a drain into his premises of course he is liable; and if another throws water into the drain, knowing it is stopped, and this injures another, he, too, is liable. Bro. Max. 373: cases; *Harrison*, 3 H. & C. 231; *Collins*, L. R. 4 C. P. 279. See TORTS. And this idea leads in construing commercial paper. *Sturdivant*: 410; *Williams v. Stoll*; *Lickbarrow*: 394. And this principle applies to official action, *e. g.*, illegally assessing. *Stetson*: 163; *Crepps*: 113; *Graver*: 103. Also in criminal law. *C. v. York*: 197; *Allen v. U. S.*, 164 U. S. 492, 494, 496, 1 Gr. Ev., § 18.

Also in contracts. *Hadley*; *Le Blanche* (failing to run train on schedule time), 1 Sto. Eq. 190b (false representation). Damages caused by breach of contract, *e. g.*, to carry and to deliver freight. *American Express Co.*, 86 Miss. 329, 109 Am. St. 708. And, too, if one brings a dangerous thing, like water, on his premises, he must care for it at his peril. *Fletcher v. Rylands*; *Gilson*; or a dangerous animal, *May*; or escaping fumes, *St. Helen's Smelting Co.* The above cases have extended notes in *Thomp. Neg. Cases*, and are also widely cited in all cognate cases or subjects. *Hebert*, 111 La. 522, 100 Am. St. 505-539, ext. n. (duties and liabilities of electric corporations).

In jure non remota causa sed proxima spectatur: In law the immediate and not the remote cause of any event is regarded, and this is often of great moment in procedure. The above cases may be considered in relation to remoteness, privity. See also *Gilson*, 36 Am. St. 802-861, ext. n. (extended resume and stating the leading cases on remoteness); *Fent* (setting out fire); *Vandenburgh*; *Guille*. False and sham pleadings causing injury are actionable. *McCardle*; *Graver*: 103.

All voluntarily connected with an illegal act are liable. R. v. — (cases); *Spies v. P.*; *Kirkwood*, *sub Joint Trespassers*; *Vosburgh v. Moak* (1848), 1 Cush. (Mass.) 453, 48 Am. Dec. 613, n., 1 Wat. Tres. 23, n., 73 Am. Dec. 138, *e. g.*, all connected with laying in form a legal, but in fact an illegal tax. *Stetson*; 1 Wat. Tres. 504; 6 Rob. Prac. 727; *Cool*. Tax. 211, 554; 2 Desty, Tax. 1105. See Suth. Stat. 377: cases; or repeating a libel. *De Crespigny*; *Bigel*. L. C. Torts. Liability for acts prompted more or less by uncontrollable impulses. 36 Am. St. 847, 848; *Guille* (dragging balloon); *Vandenburgh v. Truax* (chasing a boy with a pickax); *Laidlaw v. Sage*; *Gibney v. S.* (father jumping after child and with it drowning). Defamation is governed by the same idea, *e. g.*, repetition of a slander. *De Crespigny*; *Lynch*; *Terwilliger*, *sub Pollard v. Lyons*: cases; *Vicars*. Or when ball players injure a passenger on the highway. *Vosburgh v. Moak*; or the servant injures one with a firearm. *Dixon v. Bell*. See PRIVACY; *Woodward v. Miller*. Defamation: *Lynch*; *Pollard*.

A rouse debauching a girl and then inducing one to marry her is liable. *Kujek*, *sub Ashby*: 273; *Pasley*: 375. Or the joint trespassers in *Vosburg*. *Respondet superior*.

Self-defense. The squib was thrown by intermediate throwers to protect their gingerbread stands, and for this purpose a bystander threw it. And still the liability attached to Shepherd; for one may

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defend his property (Aldrich v. Wright), and one may defend his fellowman or his property. *Necessitas inducit privilegium*. Defense steps, when justified, are no basis for liability, for it is a duty. And what the law commands it does not condemn.

Procedure. Phases of Scott are discoverable in those cases holding one is liable for obtaining judgment orders, injunctions, attachments, arrests and seizures upon improper and insufficient grounds. Weeks, Atty's, § 81. See MALICIOUS ACTS; Bro. Max. 715, 8th ed.

Barbed-wire fence negligently maintained creates liability. Winkler, 126 N. C. 370, 78 Am. St. 563, n.

Selling to a child eight years old gunpowder with which he injures himself creates liability. Carter, *sub* Salisbury; Dixon; 92 Am. St. 498. Driving a horse in highway is not negligence. Brown, *sub* Fletcher v. Rylands, and reviewing and denying that case and *Sic utere tuo* (limitations of).

Trying horses in a highway is not negligence. Holmes, 10 L. R. Exch. 261; S. C. 18 Am. Rep. 384 (reviewing Hammack and Fletcher v. Rylands, travelers upon the highway assume risks from accidents).

Infants are liable for their torts. Scott; Gilson; Morgan. See INFANTS.

Reckless mistatement imposes responsibility. Pasley: 375; Thomas v. Winchester.

Saloon keeper's liability. Liquor seller's liability for assault by one he sold liquor to, and thus made drunk, upon another patron. Mastad v. Swedish Brethren (1901), 83 Minn. 40, 85 N. W. 913, 85 Am. St. 446-454, ext. n.; Curran v. Olson (1903), 88 Minn. 307, 60 L. R. A. 733, n. *Duty to patrons.* Peter, — Ark. —, 4 L. R. A. (U. S.) 649, n. (not liable).

Sudden danger caused by one, from which another is fleeing and is injured, creates a liability. Tuttle v. Atlantic City R. R. (1901), 66 N. J. 327, 54 L. R. A. 582. See Gibney v. S.

Extent of trespasser's liability for consequential injuries resulting from the trespass. Wyant v. Crouse (1901), 127 Mich. 158, 53 L. R. A. 626-635, ext. n.

Contagious disease; allowing it to spread. M., K. & T. R. R. v. Wood (omission to restrain infected persons). See TORTS.

Fent v. Toledo, Peoria & Warsaw R. R.; Whart. Neg. 153. Cool. Torts, Smith, Cas. Torts, 36 Am. St. 824, Kink. Torts, 704-711.

Negligence, fire, remoteness. Fire was set by sparks from a locomotive to a warehouse, and from this to Fent's building, two hundred feet away. The question of proximate and remote cause was held one for the jury. Fent v. R. R.; Vaughan v. Taff Vale R. R.; Henderson v. Philadelphia, etc. R. R. (1891), 144 Pa. 461, 27 Am. St. 652, n., 16 L. R. A. 299; Campbell v. Missouri Pac. R. R. (1894), 121 Mo. 340, 42 Am. St. 530, 25 L. R. A. 161, n. (statute may make railroad liable for escape of fire); Mathews v. St. Louis, etc. R. R. (1893), 121 Mo. 298, 25 L. R. A. 161, 24 S. W. 591, 9 Am. R. & Corp. Rep. 441-472, n., *id.*; Cincinnati, etc. R. R. v. Barker (1893), 94 Ky. 71, 21 S. W. 347, 8 Am. R. & Corp. Rep. 160-174, n.; Lake Erie & Western R. R. v. Clark (1893), 7 Ind. App. 145, 52 Am. St. 442.

The rationale of setting out fire and allowing it to escape is the same as that of water (Fletcher v. Rylands); or noxious fumes (St. Helen's Smelting Co. v. Tipping); or of keeping ferocious animals

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(May v. Burdett); or labeling a poisonous drug as harmless (Thomas v. Winchester); or of setting a dangerous thing in motion (Scott v. Shepherd—Squib Case).

One negligently constructing a hay rick on the extremity of his land, and in consequence of its spontaneous ignition, his neighbor's house was burned down, is liable. Vaughan v. Menlove (1836), 3 Bing. N. C. 463 (32 E. C. L. R.), 43 R. R. 711; Bro. Max. 383: cases.

Fires; liability for setting out. McNally v. Colwell (1892), 91 Mich. 527, 30 Am. St. 494-507, ext. n.; Brown v. Brooks (1893), 85 Wis. 290, 21 L. R. A. 255-263, n.; Anderson v. Miller (1896), 96 Tenn. 35, 31 L. R. A. 804 (owner may recover both value of its property and also insurance); Fires, 9 Encyc. Pl. & Pr. 1-9, Bro. Max. 383.

Dean v. McCarthy (1846), 2 Upper Canada, Q. B. 448, 1 Thomp. Neg. 116-172, n., Cool. Torts, 701, Thomp. Neg., q. v.

Trespass against McCarthy for setting out fire and letting it escape. It appears he set it out without fault or negligence to clear his land, and a high wind sprang up, and in spite of his efforts it was carried by grass to D.'s pile of cord wood and rails and burned them. Held: M. was not guilty. Negligence; fire, liability of one who sets out fires on his own land which extend to those of his neighbor. Fent.

Lynch v. Nurdin (1841), 1 Q. B. 29 (41 E. C. L. R.), 4 P. & D. 672, Thomp. Neg. 1140-1216, ext. n., q. v.; Bolin v. R. R., *sub* Volenti, etc.; 57 L. R. A. 571-574, Busw. Pers. Inj. 75, 78, 148, 17 L. R. A. 33, 1 Wat. Tres. 166, Moak, Torts, 288, 1 Add. 13, 34, 582, 589, Cool., Blah.; Bro. Max. 391, 55 L. R. A. 310, Woods, Nuis. 142, 761, 38 Am. St. 182, Mews' E. C. L., 145 N. Y. 311, 45 Am. St. 621, 46 Am. St. 218, 32 L. R. A. 827, 1 Suth. Dam. 19, 39, Pars. Conts. Whart. Neg., Shear., 36 Am. St. 835, 838, Bigl. Lead. Cas. Torts, 2 Gr. Ev. 232b; O'Brien, 119 Wis. 7 (parents' right to recover). §§ 347, 348, Hughes' Proc.

Lynch stated: Nurdin left his horse and cart unhitched near a pavement; Lynch, a six-year-old boy, with others, proceeded to take possession of the rig, when the horse started up and injured L. Held, he could recover damages.

Chicago R. R., 33 Ill. Ap. 450, 138 Ill. 370, 4 Am. R. R. & Corp. Rep. 572, n., 21 L. R. A. 76-84: cases; U. P. R. R., 152 U. S. 262; Gunn, 42 W. Va. 676, 36 L. R. A. 575, n.; Westkrook, 66 Miss. 560, 14 Am. St. 587, ext. n. (five-year-old child struck by train); Atlanta Ry., 93 Ga. 369, 44 Am. St. 145, 25 L. R. A. 553; Hartfield reviewed (parties); Pekin, 154 Ill. 141, 45 Am. St. 114, 27 L. R. A. 206; Springer, 137 Ind. 15, 23 L. R. A. 244, n., 45 Am. St. 159; Barnes, 47 La. 1218, 49 Am. St. 400-433, ext. n. (excellent resume); McGuiness, 159 Mass. 233, 38 Am. St. 412, n. (infant trespasser on one's premises injured by dangerous instrument cannot recover); Gay, 159 Mass. 238, 38 Am. St. 415, n., 21 L. R. A. 448 (trespassing child regarded as an adult). A trespasser on the premises of another assumes all risks. Indemauro; Heaven; Bamberger, 95 Tenn. 18, 49 Am. St. 909; Wallace, 26 Or. 174, 25 L. R. A. 663-669, ext. n.; Ryan, 128 Mich. 463, 92 Am. St. 481 (owner does not warrant safety of trespassers). See Indemauro.

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Trespassing children. 95 Minn. 477, 111 Am. St. 483, n.

Contributory negligence of child; negligence of parents. *McDermott v. Severe*; *Friedman*, 71 N. J. L. 605, 108 Am. St. 764 (child not protected); *Chicago R. R., supra*; *Hartfield* (New York rule); *Robinson v. Cone* (Vermont rule. *Thomp. Neg., Am. Dec.*); *Waite v. R. R.* (English rule); *U. P. R. R. v. McDonald, supra*; *Bot-toms*, 114 N. C. 699, 25 L. R. A. 784-794, ext. n., 41 Am. St. 199 (stating *Hartfield*; *Thorogood v. Bryan*); *Haynes*, 114 N. C. 203, 25 L. R. A. (electrical wires at or near street); *Gibson*, 33 W. Va. 117, 45 Am. St. 853, 22 L. R. A. 661, n. (protection of child from dangerous high-ways); *Wymore*, 78 Ia. 396, 6 L. R. A. 545, n. Turn-table left unfastened; injury to child; imputed negligence. *Gulf R. R., 77 Tex.* 356, 19 Am. St. 755, 3 Am. R. R. & Corp. Rep. 158-165, n.; *O'Leary v. Brooks Elevator Co.* (1898), 7 N. Dak. 554, 42 L. R. A. 677 (strict rule against child); turn-table cases: *Biggs*, 60 Kan. 217, 44 L. R. A. 655; cases: *Evansville*, 151 Ind. 42, 68 Am. St. 218; *Delaware R. R.*, 61 N. J. Law, 635, 68 Am. St. 727. Degree of care required of infants to escape injury. *Sioux City R. R. v. Stout* (1873), 17 Wall. 657, 21 L. ed. 745, n.; 145 N. Y. 312, 45 Am. St. 623; *Busw. Inj.* 75; *Bish. Torts*, 585; *Moak, Torts*, 288-294; *Whart. Neg.* 314-348, 420, 824, 860; *Brinkley Car Co.*, 60 Ark. 545, 46 Am. St. 216. Child trespassers; duty to. *Wynn*, 91 Ga. 344, 8 Am. R. R. & Corp. Rep. 60-72; cases: *Rodgers*, 140 Pa. 475, 23 Am. St. 250, 12 L. R. A. 216, n. (contributory negligence of); *R. R.*, 90 Tex. 65, 32 L. R. A. 825, n. (stating *Lynch*); *Chicago R. R.*, 127 Ill. 9, 4 L. R. A. 126; *Moran*, 134 Mo. 641, 56 Am. St. 543, n.; cases.

When child may sue notwithstanding parents' negligence. Notes to 39 Am. St. 454; *Pierce*, 20 Colo. 178, 46 Am. St. 279 (parties; measure of damages); *Winters*, 99 Mo. 509, 6 L. R. A. 536, n.; *Roth*, 13 Wash. 525, 31 L. R. A. 855 (\$15,000 not excessive for a leg); *Kopplekom*, 16 Colo. Ap. 274, 54 L. R. A. 284; cases: *Schauf*, 106 Ky. 229, 90 Am. St. 229 (municipal corporations not liable for drowning of child in a pond not in proximity to high-way).

What are natural consequences of wrongful act. 5 Mews' E. C. L. 266-305; cases, citing *Victorian*; *Hadley*; *Smeed*; *Sharp*; *Burrows*; *LeBlanche*.

Robinson v. Cone (1850), 22 Vt. 213, 54 Am. Dec. 67, 2 *Thomp. Neg.* 1129, ext. n., *Cool. Torts*, 826, *Pars. Conts.*, *Whart. Neg.*, *Shear*, *Busw. Pers. Inj.*

Robinson stated: R., a four-year-old child, was "coasting," with consent of his parents, where many children so played. Cone was driving on the way, meeting the child, and made no effort to avoid a collision until it was imminent. For severe and lasting injuries the child recovered damages. This case presents many features like *Davies*. It is known as the Vermont Rule, which seems the prevailing one, and certainly wherever *Davies* is accepted. The only difference is that in one the donkey was run over, and in the other it was a child.

It is negligence to permit a two-year-old child to play in a highway; and he cannot recover for injury if traveler was not guilty of gross negligence. See *Ploof*, 70

Scott v. Shepherd.—

Vt. 509, 43 L. R. A. 108; *Hartfield v. Roper* (1839), 2 Wend. 615, 34 Am. Dec. 275, 2 *Thomp. Neg.* 1121-1216, ext. n., *Cool. Torts*, *Bish.*, *Moak*, 292; *Whart. Neg.*; *Shear*, 1 *Bigl. L. C. Torts*; *Busw. Pers. Inj.*; *Atlanta Ry., supra*; 44 Am. St. 145, 26 L. R. A. 533 (parties, when infant sues). See *Phila. R. R., post*; *Carey*, 187 Mo. 715, 70 L. R. A. 65 (fault of child).

Waite v. North Eastern Ry. (1858), El. Bl. & El. 719 (96 E. C. L. R.), *Bigl. Lead. Cas. Torts*, 731; *Chicago Ry. v. Wilcox, supra*; *Shear. Neg.*, *Whart.*, 1 Add. *Torts*, 567, 1 *Chit. Conts.* 734; 6 L. R. A. 540; 2 *Dill. Corp.* 1007, *Busw. Pers. Inj.* 107, 149; *Mews' E. C. L.*

Waite stated: Imputed negligence. Mrs. W., an aged lady, had a five-year old grandson in charge. She bought a ticket for each, and was attempting to cross the track to take a train which ran upon another track on the opposite side of the station. In crossing, from concurrent negligence of herself and the train-men, she was killed and the child injured. *Held*, he could not recover. This case presents the English rules.

Imputed negligence; identification; doctrines of Thorogood v. Bryan. *Busw. Pers. Inj.*; *Tucker v. Draper* (1901), 62 Neb. 66, 54 L. R. A. 321, n.; *Hampel*, 138 Mich. 1, 110 Am. St. 275-298, ext. n.; See NEGLIGENCE.

Lynch v. Nurdin and its cognate cases are highly illustrative of the policy of the law to protect, and of the intelligence and diligence that it exacts of the owner of property, and of those who own, control and use dangerous instruments, and how all must take notice of a subject-matter and shape their conduct from it, for the public welfare. Mastery of these cases is of great consequence in comprehending the tremendous discussions that surround the principle in *Davies*; contributory negligence. *Volenti*.

A child upon a railroad track (not at a crossing) is regarded as a trespasser. The train may be started without giving warning. *Philadelphia R. R. v. Hummell* (1863), 44 Pa. St. 375, 1 *Thomp. Neg.* 433, 462, 84 Am. Dec. 457-461, 5 Am. Law Reg. (O. S.) 244, 1 Wat. Tres. 6; *Whart. Neg.*; *Busw. Pers. Inj.*

Accidents at crossings. *Bullock v. Wilmington R. R.* (1890), 105 N. C. 180, 2 R. R. & Corp. Cas. 336-342, n.; *Busby*, 126 Pa. 559, 12 Am. St. 919, n. (care required of passengers at crossings); *Sweeney*.

Going on and crossing railroads. One should "stop, look and listen." If he falls he is negligent, and there applies to him *Volenti*. *Pomponio*, 66 Conn. 528, 32 L. R. A. 531, n., *Busw. Pers. Inj.* 66-70; *Howe* (1895), 62 Minn. 71, 54 Am. St. 616, n.; 55 Am. St. 287; *English*, 13 Utah, 407, 57 Am. St. 772, n., 35 L. R. A. 155; *Delaware R. R.*, 139 U. S. 469, 4 Am. R. R. & Corp. Rep. 434-443, n.; *Harlan*, 64 Mo. 480, 1 *Thomp. Neg.* 439-462, ext. n., 5 Cent. L. J. 221; on rehearing, 65 Mo. 22, 6 Cent. L. J. 229, *Cool.*, *Bish. Torts*; *S. v. Chicago*, etc. R. R. (1890), 29 Neb. 412, 2 Am. R. R. & Corp. Rep. 664-669, n.

SCOTT v. TYLER (1788), 2 Brown, C. Rep. 432, 2 Dick. 712, 29 Eng. Reprint, 241, 2 W. & T. L. Eq. Cas. 429-572, ext. n., 2 Pom. Eq. 933, *Mews' E. C. L.*

Condition in restraint of marriage; public policy. See *Egerton v. Brownlow*; *Lowe v. Peers* (1768), 4 Burr. (Eng.) 2225, 6 Rul. Cas. 347-492, n., *Shir. Lead. Cas.*

Scott v. Tyler.—

133, Laws. Lead. Cas. Simp. 102, Ans. Conts. 187, Greenh. Pub. Pol. 450, 2 Chit. Conts. 988, 2 Jac. Fish. Dig. 2246, 4 *id.* 5941, Danl. Nego. Insts., Rand. Com. Paper, Bish., Sto., Pom. Eq., Bish. Conts. A covenant to marry no one but a person named, and if another person is married to pay £1,000 in twenty days, is void. *Scott v. Tyler.*

Contracts in restraint of marriage. *Mad-dox*, 11 Gratt. (Va.) 804, 2 Per. Trusts, 512, 515, Greenh. Pub. Pol. 478-482; Chapin, 73 Conn. 72, 84 Am. St. 139-152, ext. n. See *Lowe v. Peers.*

SEA: Jurisdiction over. And. Dic. 924; R. v. Lewis: 173; R. v. Keyn: 171.

SEABURY v. GROSVENOR: L.C. 281.

SEAL: One may be adopted by many. § 33, Hughes, Conts.; 181 U. S. 460.

Imports a consideration. Jackson v. Cleveland; Sloman: 393; 9 Cyc. 297. See Kemble: 391; Peachy: 392; Ans. Conts. 49; §§ 66, 80, Hughes, Conts. Offer under seal irrevocable. Ans. Conts. 12, 18, 20, 25; Cooke: 321; Watkins, 105 Va. 269, 115 Am. St. 880 (gratuitous promise under seal is binding. Ans. Conts. 59, n. See exception, contracts in restraint of trade. Ans. Conts. 59).

Corporations may contract without, in America. Ans. Conts. 51; Bank v. Paterson, sub Hill.

Putting a seal to a writing foreclosed all inquiry into the question of legality of consideration prior to Collins v. Blanton (1767). Since then constant attacks have been made upon the strict doctrine of the sealed instrument. And it is now held that if a seal is added to an instrument that was not required to be sealed at common law, then it is surplusage. Gibson.

Essential for process. Choate (1893), 113 Mont. 127, 50 Am. St. 425-454, n., 20 L. R. A. 424-430, ext. n., Ald. Jud. Writs, 31-36; Gordon, 59 Kan. 51, 68 Am. St. 341, n. (executions); Stouffer, 68 Kan. 135, 104 Am. St. 396, n.

Essential for a bill of exceptions, when made so by statute. Ita lex scripta est. Amendment after sale by adding seal not permissible. Weaver, 163 Ill. 251, 34 Am. St. 469. See PROCESS.

Corporations both public and private may adopt any seal they choose and also vary this from time to time. D. C. v. Camden, 181 U. S. 452.

Generally: 2 Bouv. 964; And. Dic. 926-927.

SEALED INSTRUMENTS: Deeds; nature and effect. Christmas; Cooch; Elwell; Jackson; Heaton; Hibblewhite; Ans. Conts. 46, n.; § 32, Hughes, Conts. 2 Page, Conts. 555-567.

Seal affixed, when not required by the nature of the instrument, is surplusage. Gibson. See *Aller*, 40 N. J. L. 446, Ans. Conts. 59, n.; U. S. v. Cramps, 206 U. S. 118, § 80, Hughes' Conts. *Form of a deed.* § 146, Hughes' Conts.

Parties named in, only can sue. Williams: 93; Cooch. See PARTIES.

SEARCH: Of prisoners upon arrest. Shields v. S. (1893), 104 Ala. 35, 53 Am. St. 17, n., Bish. Crim. Proc. 210, Whart. Cr. Pl. 60-71, Clark, Cr. Proc. 34; Rusher v. S. (1894), 94 Ga. 363, 47 Am. St. 175, n., 1 Gr. Ev. 254, n. See ARREST; *Nemo tenetur*, etc. *Generally:* 2 Bouv. Dic. 968; And. Dic. 928.

SEARCH WARRANTS: 2 Bouv.; And. Dic. Must be certain. Semayne's Case; Fisher v. McGirr; Allen: 187; Ald. Jud.

Search Warrants.—

Writs, 209. Warrants for and to seize person and property must be in writing and certain, is a requirement of constitutions. See ARREST; White: 130; Frost v. P. (1901), 193 Ill. 635, 86 Am. St. 32, n.

SEATON v. BENEDICT, sub MARRIED WOMEN.

SEATTLE NATIONAL BANK v. JONES: L.C. 36.

SECUNDUM ALLEGATA ET PROBATA: As alleged and proved. *Cited*, §141, Gr. & Rud.

SECURITY FOR COSTS: Requirements for, are constitutional. *Harrigan v. Gilchrist*, sub MAGNA CHARTA. Bouv. Dic.; 11 Cyc. 170-200.

SEDUCTION: Borden: 267; Terry v. Hutchinson (1868), 9 B. & S. 487, Lawyer, 130 N. Y. 239, 27 Am. St. 521, 14 L. R. A. 700, n.; White v. Murland (1874), 71 Ill. 250, 22 Am. Rep. 100; Bradshaw, 103 Tenn. 331, 76 Am. St. 655-682, ext. n.; Martin v. Payne (1812), 9 Johns. 387, Bigl. L. C. Torts, 286-305, ext. n., 6 Am. Dec. 288, Cool. Torts, Bish. Torts (girl nineteen years old who had left home; recovery allowed). A recovery is allowed for any girl living at home, even if thirty years old. Postlethwaite, 3 Burr. 1878; Borden: 267. As a crime. McClain, C. L. 1109-1113; Bish. Stat. Crimes, 625-655, Moak, Underh. Torts, 384, 5 Crim. Def. 755-785. Adult woman may sue for, when induced by fraud; e. g., promise of immediate marriage. Hood: 141; S. v. Ring, 142 N. C. 596, 115 Am. St. 759, n.

Subsequent marriage as a bar. Lewis, 67 Kan. 562, 100 Am. St. 479.

Generally: 4 Suth. Dam. 1281-1285; Cool., Bigl. L. C. Torts.; 2 Gr. Ev. 571-579; Bouv.; And. Dic.

SEIXAS v. WOODS: Caveat emptor.

SELF-DEFENCE: *Necessitas inducit privilegium*; U. S. v. Holmes; Aldrich v. Wright; S. v. Sumner (1898), 55 S. C. 32, 74 Am. St. 707-740, ext. n.; McClain, C. L. 136-144; 21 Cyc. 800-874, 1050-1061.

When it may be employed. Salus populi: Necessitas inducit; Bro. Max. 11, 12; U. S. v. Holmes; Tiede, Pol. Power, 13; cited, Bish. C. L.; *Salus*, etc. To resist usurpation. See ARREST, sub U. S. v. Holmes. By one who commenced the conflict. Fouch v. S. (1896), 95 Tenn. 711, 45 L. R. A. 687-712, ext. n.; C. v. Selfridge; *Qui primum peccat*, etc. Acting on appearances. John Bad Elk; sub, *Salus populi*, etc. 74 Am. St. 717-730.

Provoking a strife impairs a full defense. C. v. Selfridge; *Nullus commodum*; *Qui primum peccat*; 74 Am. St. 731-735.

Necessity is excuse for. Squib Case. *Necessitas inducit.*

Property; defense of. 74 Am. St. 737; Aldrich. Spring guns; right to set in defence of property. Bird v. Holbrook. Knowledge of injured person. Hott v. Wilkes (1820), 2 B. & A. 304 (5 E. C. L. R.), 22 R. R. 400 (Volenti); S. v. Barr, 11 Wash. 481, 39 L. R. A. 154-163, ext. n.; Hooker v. Miller.

Of other persons. 74 Am. St. 735-737. See U. S. v. Holmes; Aldrich.

Excessive defense must not be employed against mere trespassers. Aldrich; Bird; Hooker v. Miller; *Necessitas.* Spring-guns and dangerous things can not be employed against mere trespasser. Aldrich; Bird. *Self-preservation as an excuse for crime.* R. v. Dudley; McClain, C. L. 137. *Generally:* Bouv. 976-978; And. Dic. 328.

SEMAYNE'S CASE (*Semayne v. Gresham*)

(1805), 5 Coke (Eng.), 91 (Vol. 3), 1 Sm. L. C. 238-249, 104-118, 11th ed. (reviews English cases); Ames, Cas. Torts, 241, 11 Rul. Cas. 628-647, n., Ald. Jud. Writs, 175; *Isley*: 169; 20 R. I. 432, 78 Am. St. 887; *Foley v. Martin* (1904), 142 Cal. 256, 100 Am. St. 123, n. (officer can not break doors to serve process in all cases); Bro. Max. 432, 1 Add. Torts, 502 (five resolutions stated); Cool. Const. Lim. 367, Mech. Pub. Off. 779; Cool. Torts, Bish. Torts, 2 Wat. Tres., 13 Crim. Law Mag. 351, Herm. Ex. 155, 1 Bish. Crim. Proc. 195, 199. *Cited*, §§ 18, 19, Hughes' Proc.; §§ 152, 294, 296, Gr. & Rud.

Semayne stated: Berisford and Gresham were joint tenants and lived together upon the premises so owned. B. became in debt to S. and acknowledged a recognizance in the nature of a statute staple (a species of chattel mortgage). B. died, and G. by survivorship became sole owner of the house. S., the chattel mortgagee, sent the sheriff to seize the chattels, and G., seeing this, shut the door and thus barred and resisted the sheriff. For obstructing him S. sued G. and failed to recover, the court holding that, even though the king was a party, still even he must demand that the front door be opened. No demand having been made, it was held that G. committed no wrong in locking his front door. It seems that if the request to open the door had been made, then the case would have been decided otherwise. In making an arrest the officer must impart sufficient information at the time. *S. v. Taylor* (1896), 70 Vt. 1, 67 Am. St. 648, 42 L. R. A. 673-684, ext. n.

Every man's house is his castle, Domus sua, etc. Necessitas inducit. Foley, supra. Breaking and entering doors to serve process. Tiede. Pol. Power, tit. ARREST; Hawkins v. C. (1854), 14 B. Mon. (Ky.) 394, 61 Am. Dec. 147-164, ext. n.; *Fisher v. McGirr*; *Kelley v. Schuyler* (1898), 20 R. I. 432, 78 Am. St. 887.

Important points deduced from Semayne's Case: 1. The house of every one is his castle, and if thieves come to a man's house to commit a violent felony, *e. g.*, to rob or to murder, and the owner or his servants, or any third person, kill such thieves in defense of his house, it is no felony. It is proper to observe that this rule is in strict accord with the law of self-defense, wherein any one may stay a felonious malefactor to prevent the commission of a violent felony. 1 Bish. C. L. 843, 877, 1 Kent, 48, 2 Bl. Comm. 3, n.; *Stanley v. C.*, 86 Ky. 440, 9 Am. St. 305; *Beard v. U. S.*, 158 U. S. 500, 39 L. ed. 1086.

2. It is not lawful for the sheriff, at the suit of a private person, to break into defendant's house to execute any civil process; the defendant's house is his castle.

3. A man's house is not his castle when the king or state is party to a criminal charge. In such case, after demand to open the door and imparting requisite information, the outer door may

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be broken, if necessary, to execute criminal process. *Hawkins v. C., supra.*

4. A man's house is not his castle when some one else has got the better of him in an action of ejectment. In this case, of course, it has ceased to be his home at all, and therefore has ceased to be his castle. See *Taylor v. Cole*, sub *Salus populi*, etc.

5. A man's house is not his castle when the outer door is open. The sheriff, having once gained admission into the house, may break open as many inner doors as he pleases. Notes, *Semayne's Case*; *Smith, Lead. Cas.*; *Sampson v. Stearns*, sub *Salus*.

6. A man's house is not his castle for anyone except himself and his family. He may not shelter therein a person who has taken refuge there, or who removes his goods there to prevent the sheriff from getting hold of them on civil process. Civil process may be executed against a third person or his goods in the dwelling of another, exactly as if the people were criminal against the owner.

7. And it is held that one's habitation may be invaded and torn down by health boards to prevent the spread of a contagion. *Meeker*, 14 Wend. 397, Moak, Torts, 506. See *NUISANCE; Sic utere tuo*, etc., 2 Wat. Tres. 281; *Miller v. Horton*.

Excuses for entering on premises. 2 Wat. Tres. 810-857, 781; *Williams v. Esling*; *Anthony v. Haney*. When inferred from intimacy. *Cutler, infra*; *Lakin*, 10 Cush. (Mass.) 198; *Adams, infra*.

Semayne's Case enters largely into constitutional law, where its principles are reaffirmed and with some enlargement. Art. IV, Constitution of the U. S. The procedure is prescribed and is of the very strict kind. The facts must be stated, and upon oath. *Lustig v. P.*, 18 Colo. 217, 219 (strict rule of pleading required); *Chipman*, 15 Vt. 51, 40 Am. Dec. 663-667, n., 2 Wat. Tres. 807-810; *Fisher v. McGirr*; *Dovaston*; 217; *Lippman v. P.* (1898), 175 Ill. 101; *White v. Wagar*: 130.

If a house is described a barn cannot be searched. Note, 40 Am. Dec. 666, 2 Wat. Tres. 807; *Jones*, 41 Me. 254; *Downing*, 8 Gray, 539; 2 Add. Torts, 1017, Bish. Crim. Proc. 716-719; *Bristow*; 135; 1 Gr. Ev. 63. *Expressio unius. Pleading given authority. Sache.*

Unreasonable searches and seizures prohibited. *Shuman*, 127 Ind. 109, 11 L. R. A. 378, ext. n.

Dwelling protects not only occupants, but also their children, domestic servants, boarders and lodgers. *Oystead*, 13 Mass. 520, 7 Am. Dec. 172. *Inviolability of house.* 2 Wat. Tres. 812-820, Bish. Crim. Proc. 195-199, Sedgk. Stat. & Const. 571.

Dwelling house; arrest for crime may be made by breaking into, but not civil process. Bish. Torts, 816, 1 Bish. Crim. Proc. 195-205, 2 Wat. Tres. 820, Bro. Max. 434, Bigl. Fraud, 168; *Foley, supra*. And officer and his sureties are liable for. *S. v. Beckner* (1892), 132 Ind. 371, 32 Am. St. 257, n. It is held that the service is valid, but that the officer is liable. Bro. Max. 439. But see *Isley*: 169; 2 Wat. Tres. 820, 2 Add. Torts, 895-929; *Dunlap*.

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Entry of a stranger's premises to serve process. Blatt, 161 Mass. 21, 42 Am. St. 385, n.; Bro. Max. 440 (technical rules stated).

Castle will not protect a third person, nor his goods. Bro. Max. 440. Nor bail against his principal. Read v. Case (1822), 4 Conn. 166, 10 Am. Dec. 110, See BAIL.

Entry on another's premises, when justified. Williams v. Esling; Cutler, 57 Ill. 252, 2 Wat. Tres. 778-890, 908, Bigl. Lead. Cas. Torts, 341-387. Cool., 302, 569, Moak, 350, 351; Adams, 12 Johns. 408, 7 Am. Dec. 327, Sedg. Dam. 133.

SEMPER NECESSITAS PROBANDI incumbit et qui agit: See ACTORE.

SEMPER PRÆSUMITUR PRO NEGANTE: The presumption is always in favor of the one who denies. Actore; 4 Wigm. Ev. 2483-2539. Cited, §§ 21, 23, Hughes' Proc.; §§ 52, 118, 144, 163, 271, 270a, 272, Gr. & Rud.

One who alleges a law to exist must show it. C. v. Bank (1862), 5 Allen, 428, 431, 432. The actor must produce the law and show his allegations, and his evidence upon it. *Burden of establishing an issue is on an actor.* 1 El. Ev. 132. *Who has the right to open and close.* Bonnell: 185; 1 Ell. Ev. 133. See RIGHT TO BEGIN.

SEMPER PRÆSUMITUR PRO SENTENTIA: Presumption is always in favor of the sentence. See Campbell: 2; *Omnia præsumuntur rite*; Hannah: 128; AGENCY. This is true of a superior judgment sued on a debt; and also in appellate procedure after the common law record is found to be sufficient, and in *Res adjudicata*. The proceedings must be shown to be *coram iudice*.

Fraud must be alleged and proved. Harrigan, sub MAGNA.

SENIOR v. ARMITAGE: Wigglesworth: 39.

SENTENCE: May be suspended during term. Weber v. S., 58 O. St. 616, 41 L. R. A. 472; P. v. Allen, 155 Ill. 61, 41 L. R. A. 473.

Suspension of; power of court to. Neal v. S. (1898), 104 Ga. 509, 69 Am. St. 175, n.; Miller v. Evans (1901), 115 Ia. 101, 91 Am. St. 143 (no power to except for an appeal); P. v. Adams, sub *Nemo tenetur*, etc.; 98 Am. St. 689. *Excessive sentences; effect of.* Re Taylor (1895), 7 S. D. 382, 45 L. R. A. 136-159, ext. n.

SEPARATE ESTATE: MARRIED WOMEN.

SEPARATION OF WITNESSES: Discretion allows. 1 Gr. Ev. 432, 1 Wh. 491; 2 Best, 636, 2 Tay. 1254; 3 Wigm. 1837-1842 (sequestration of witness); 1 Bish. Cr. Proc. 1168-1193; Holder v. U. S., 150 U. S. 91; 8 Encyc. Pl. & Pr. 92; Kelly, 14 Colo. App. 208; Hennessey, 12 Colo. App. 254. 3 Wigm. 1837-1842 (Susanna's Case quoted for history of the rule). *Demandable as a right.* 3 Wigm. 1839.

SEPULTURE: S. v. McLean (1897), 121 N. C. 589, 42 L. R. A. 721-738, ext. n. (law of the different states); Bettison (1874), 12 Moak. Rep. 654, ext. n.; 2 Bish. Cr. Proc. 1009-1012.

SEQUESTRATION: Of witnesses. 3 Wigm. 1837-1842. See SEPARATION.

SERVANT: When liable for his torts to third persons. Harriman. To the master. Harriman. For acts innocently done. R. v. Michael.

SERVICE: And. Dic. Civil Service, id.

SERVICES: Contracts for, when personal. Robinson: 309.

SERVICE OF PROCESS: Must be within state; all remedies and process are domestic. Pennoyer: 58; Harkness: 152.

Issuance and service of may be waived. *Quilibet potest;* Pennoyer: 58; cases; Quinn v. P.; S. v. Shrader, 73 Neb. 618, 119 Am. St. 913; infants cannot waive. Galpin: 63.

Partners; service on one for another; when valid. Wood v. Watkinson. *Must be fair and free of fraud and deception.* Dunlap: 168; Harkness: 152.

Privilege from. Dunlap: 168.

Must not be on party's attorney, or witnesses attending court. Sub Dunlap: 168.

Construction. And. Dic. 938. It is presumed from a judgment in Illinois. Franklin Lodge; Harrow; Forest, 218 Ill. 165, 209 Am. St. 249, n.

Breaking and entering doors for. See Semayne's Case; *Domus sua.* Arrest. Allen: 167. *Proof of service.* See RETURNS.

Mandatory record must be shown upon. Sanford; Cooper v. Reynolds; Galpin: 63.

Defects in jurisdiction. Sanford. *Appearance only will dispense with.* *Validity of judgment depends on.* Omaha Bank, 73 Neb. 351; 119 Am. St. 903. Pennoyer: 58.

Publication; service by. *Due process of law.* Title Co., 150 Cal. 289, 119 Am. St. 199, cites and discusses Pennoyer: 58.

Service of summons confers jurisdiction, and not the return. Bank, 128 Cal. 208, 78 Am. St. 42 (jurisdictional facts must appear from the record, is the general rule). See CONSTRUCTIVE NOTICE.

Imprisoned persons may be served. White, 125 N. C. 25, 74 Am. St. 630, 46 L. R. A. 706, (may be served, as others).

Service on corporations. Aldrich, 24 Oreg. 32, 41 Am. St. 831-837, n.; Foster, 5 S. D. 57, 49 Am. St. 859, 23 L. R. A. 490-504, ext. n.

Public officers. Service for foreign corporations. Lonkey, 21 Nev. 312, 17 L. R. A. 351. See NON RESIDENTS.

Must be served as statute prescribes. George, 46 S. C. 1, 57 Am. St. 671, n.; 102 Am. St. 564-572. Infants must be served. Galpin: 63.

If served on a wrong person, who fails to appear, it confers jurisdiction, and a judgment against him is binding. Uland, 77 Minn. 543, 77 Am. St. 698, n. *Fabula.* Generally: Bouv.; And. Dic.; Ald. Jud. Writs.

SETOFF: Rose v. Hart; Nix, 118 Ga. 345, 98 Am. St. 111-117 (mutuality not essential); 2 Bouv. 988, 989, And. Dic. See COUNTERCLAIM; RECONVENTION. § 139, Hughes' Proc.

Insolvency an element. See COUNTERCLAIM, and Greer: 283, sub *QUIA TIMET ACTIONS*: 152 U. S. 616; cases; Very v. Clark (1900), 177 Mass. 52, 83 Am. St. 260; Collins, 97 Me. 23, 94 Am. St. 458, n. Cited, § 40, Gr. & Rud.

Judgments; setoff of. Graves (1843), 4 Hill, 559, 40 Am. Dec. 296-298, n.; Simmons, 31 S. C. 389, 17 Am. St. 36, n.; DeCamp, 159 N. Y. 444, 70 Am. St. 570, n.; Barbour, 50 Ohio 90, 20 L. R. A. 192, n., 2 Suth. Dam. 386-395; Whitehead, 7 Colo. App. 460. See JUDGMENTS; Leitz, 207 Pa. 289, 99 Am. St. 791.

Mutuality essential. Rose. *Contra:* Sloan v. McDowell, 71 N. C. 356, 2 Sto. Eq. 1444; Collins, *supra*; Henderson, 9 S. & R. (Pa.) 379, 1 Am. Dec. 733, n. (mutuality essential except under codes). In some states, the plain language of the code relating to the liberal pro-

Setoff.—

vision is construed away, allowing set-offs, etc., to avoid circuity of action. *Cujus est instituere.*

Set-off in bankruptcy cases. Morgan, 178 Mass. 350, 55 L. R. A. 33-77, ext. n. Must be owned at the time suit is brought. Drennan, 132 Ala. 246, 90 Am. St. 902, n.

Pleading of, admits plaintiff's cause. Ansley; Wat. Setoff, 532; 1 Gr. Ev. 204.

Independent suit may be brought for. Wat. Setoff, 573; Mondel: 77; Tidewater, 105 Va. 160, 115 Am. St. 864 (statutes allowing are liberally construed).

Favored from convenience. Partridge: 190.

SETON v. SLADE, W. & T. L. C. (specific performance of contracts. See *Id.*). Cited, § 145, Hughes' Conts.; § 297, Hughes' Proc.

SEXTON v. CHICAGO STORAGE CO. (1889), 129 Ill. 318, 16 Am. St. 274-282, n.

Landlord and tenant; assignment of lease; rights, duties and liabilities of landlord, tenant and assignees. Sexton Case; Wood, Landl. & Ten. 498; *Washington Natural Gas Co. v. Johnson* (1889), 123 Pa. 576, 10 Am. St. 553-565, ext. n. Liability of assignee for rent. Bonetti v. Treat (1891), 91 Cal. 223, 14 L. R. A. 151, n. Tenant cannot assign, and by this absolve himself from liability to pay rent. *Washington Natural Gas Co. v. Johnson*, supra; *Grommers v. St. Paul Trust Co.* (1893), 147 Ill. 634; note, 4 Kent, 96. Leases; forfeiture; cause for. 4 Kent, 104, n.; Willison. Creditors may take out execution when tenant cannot assign or sub-let. Bro. Max. 489, 490. See LEASE.

SEXTON v. SEXTON (1905), 129 Iowa 487, 105 N. W. 314, 2 L. R. A. (N. S.) 708-712.

Wife's testimony against husband; statute regulating, is governed by public policy. Salus populi suprema lex. The marital relation demands respect in the construction of statutes. Construction must make statutes harmonize and advance fundamental justice. Codes and practice acts are governed by this rule.

Privileged communications between husband and wife were inviolable at common law. 1 Gr. Ev. 254. And so they are under statutes. S. v. Wooddraw.

The broad language of statutes yields to construction for the public welfare. Statute declaring a common law rule is construed by fundamental law. *Cessante ratione legis cessat ipsa lex.* From necessity some communications are not privileged. *Necessitas inducit privilegium.* A most liberal rule admitting the evidence of a spouse is laid down in *Sexton*.

SEXTON v. WHEATON: See *Twyne's Case*. Cited, §§ 19, 101, Hughes, Conts. Fraudulent conveyances. Cited, § 158, Hughes' Proc.

SHAFER v. S. (1851), 20 Ohio, 1, 4 Crim. Def. 31; 2 Fars. Conts. 87: cited, 1 Wh. Ev. 85.

Shaffer stated: Shaffer, a boy in his sixteenth year, three months before his sixteenth anniversary married a girl, after living with her a short time, renounced her and the marriage, and returned home. Afterward he married another girl. He was then indicted for bigamy. His defense was, that under the laws of Ohio he could not make a valid marriage contract and consummate it before he was sixteen. This defense was successful,

Shaffer.—

and he was acquitted. *Quod ab initio non valet*, etc.

At common law, males at fourteen and females at twelve can contract marriage, and if consummated by cohabitation, it is valid. As to contracts of infants, see *Craig*, 18 Am. St. 569-726, ext. n. See INFANTS.

Bigamy; first marriage must be legal. R. v. Brown. Proof of former marriage. *Hiler v. P.* (1895), 156 Ill. 511, 47 Am. St. 221-232, n.

Intent immaterial in bigamy. C. v. Mash; P. v. Robey; R. v. Prince.

The criminal case often involves the elements of contract. R. v. Conde: cases; *Melius*.

SHAM PLEADINGS: Obstruct and impede courts. Piercy; Cutter: 308. §§ 13, 15, 21, 22, 42, 93, Hughes' Proc. Void. §§ 52, 278, 294, Gr. & Rud. 96 Minn. 422, 113 Am. St. 630-653, ext. n.; P. v. McCumber: 110.

Exceptio falsi est omnium ultima: A false plea is the basest of all things. *Peccatum peccata*, etc.; Graver: 103. *Defined*, Bliss, Pl. 422.

A contempt. Graver: 103. See *Rensberger*. *Fictitious allegations not allowed.* Bliss, Pl. 151. *Secure orders and trials that delay and injure.* Weeks, Attys. 81: cases. *Trial secured by sham pleadings*, in *Crepps*: 113; *Rensberger*.

Rules, are to exclude covin, fraud and chicanery. See *MORALITY*. §§ 13-18, Hughes' Proc.; Robinson: 45. *Sham pleadings are a contempt of court.* Brown: 105; Ferguson: 264; Graver: 103. Causing proximity is reprehensible. Piercy. General issue offensive to genius of codes. Piercy. And in all courts where pleadings are to limit issues and to narrow proofs.

Causing injury on principle, are actionable. Graver; Ferguson: 264. Courts should afford a hearing of charges that pleadings are false and sham. *Sub P. v. McCumber*: 110; Graver: 103; Borden: 267; Piercy. *Affidavit may show.* P. v. McCumber: 110.

Denials must be bona fide. Humphreys: 38; Graver: 103. See *DENIALS*. Bell v. Brown; Piercy; Dickson: 34: cases.

False pleadings, if verified, are perjury. Bell; Bliss, Pl. 343, 344. See *DENIALS*. One may plead as many defenses as he may have. Bell; Graver: 103; Piercy; Seattle: 36.

Confer no jurisdiction. Bliss, Pl. 422, 480-492. See *Coram iudice*; Garland: 60; S. v. Baughman: 268; Wonderly: 102; Kingston: 46: cited, Bro. Max. 329, 321; § 13, Hughes' Proc. See *Res adjudicata*; cases.

Reality of wrong must exist. California: 270; Kingston's Case, cited, Bro. Max. 329, n., 342, 971. See *Ex facto jus oritur*. See *WAIVER*; S. v. Baughman: 268; *Rensberger*.

They are contempts and should be so treated. Graver. Judgments founded on sham pleadings are void. Graver; Borden; Ferguson; Bro. Max. 329, 342.

Evasive answers authorize a judgment. Lowry; Graver; Garland. Or other pleadings. *Id.* Will vitiate a judgment. Graver; Borden. 1 Bailey, Jurisdic. 161; Ferguson.

Inconsistent defenses; how far permissible. Bell; Seattle; *Verba fortius*, etc. Are not allowed. Bliss, Pl. 342, 343. *Dolus*. Amendments by permitting of, not allowable. They are without merit.

Mala fide practice is contempt. Graver: 103; Weeks, Attys., § 81; Bell. Mis-

Sham Pleadings.—

chievous subterfuges are culpable. Graver: 103.

Remedy in equity was to refer to a master. Weeks, Attys., § 81.
How shown and corrected. Pittsburg R. R., 150 Ind. 576, 65 Am. St. 377, n.; P. v. McCumber. Bliss, Pl. 422, 731. Reputations of a count are fictitious. Sturges: 111.

An issue of fact upon a plea of abatement, if decided for a plaintiff, the judgment is *quod recuperet*. R. v. Gibson (abatement).

Expunging of false and sham pleas. 11 Mews' E. C. L. 908-910.

SHAMES: Transfer of. Ans. Conts. 51, 54, 225.

SHARP v. POWELL (1842), L. R. 7 C. P. 253, 2 Eng. Reprint, 567, 36 Am. St. 809, 821, 837; Brown v. Chi. R. R.: Mech. Cas. Dam.; Moak, Torts, Rule 4, Cool. Torts, 76, 77, Whart. Ag. 391; Gilson v. Delaware. §§ 345, 347, Hughes' Proc.

Sharp stated: Negligence contributing to an injury; when too remote. In violation of a statute, a servant washed his master's van in a street. This caused a sheet of ice to form over the way, which caused an injury to the horse of S., who sued. The defense was that the injury was too remote, was not a proximate cause; and the court so held.

Cf. Salisbury; Squib Case; Chamberlain, 84 Wis. 289, 19 L. R. A. 513, n.; Gilson v. Delaware: cases; Decker, 116 Wis. 643.

SHARPLESS v. MAYOR OF PHILADELPHIA (1853), 21 Pa. 147, 59 Am. Dec. 759-790, ext. n., 5 Am. Law Reg. (O. S.) 27, Gt. Opin. Gt. Judges, 593; Tiede. Police Power; Freund, Pol. Power; Cool. Const. Lim.

Limitations of legislative power to interfere with property. Standard Co., 46 N. J. Eq. 270, 19 Am. St. 394, n. See Taylor: 219a; Thorpe; Allen; Loan Ass'n; P. v. Town of Salem; Millett: cases; Stockdale: 377. See POLICE POWER; CONSTITUTIONAL LAW.

SHELLEY'S CASE (1579-1581), 1 Coke, 93b, 9 Rul. Cas. 300; 10 *id.* (q. v.) 699-863, 4 Kent, 210-233, 267, 386, 1 Warv. Vend. 400, Bro. Max. 558, q. v., Mews' E. C. L.; Glenorchy v. Bosville, 1 W. & T. L. Eq. Cas., Bish. Conts. 384, 2 Pom. Eq. 1001, 2 Sto. 1493, 2 Dev. Deeds, 846; 2 Wash. R. P. q. v., 1 Wash. R. P. 84, 2 Sm. Lead. Cas. 647, 8th ed., 1 Per. Trusts, 357, 370, 4 Kent, 267, 10th ed.; cited, §§ 26, 147, Hughes' Conts.; §§ 215, 219, Hughes' Proc.; §§ 13, 18, 24, 151, Gr. & Rud. Doyle, 127 Ia. 36, 69 L. R. A. 953-968: cases (dissenting opinion); Thompson, 138 N. C. 32, 107 Am. St. 514, n.

Shelley stated: "When the ancestor, by any gift or conveyance, taketh an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs in fee or in tail, the heirs are words of limitation of the estate, and not words of purchase." 1 Coke, 104; Bouv. Dic. Thus, an estate is given A for life, and remainder to his heirs in fee simple; his heirs take nothing by the conveyance itself. 4 Kent 214. Many states have abolished the rule in Shelley's Case. Tiede. Real Prop. 426.

This rule has been the subject of much comment. It is given by Mr. Preston, Es-

Shelley's Case.—

tates, vol. 1, pp. 263-419, as follows: When a person takes an estate of freehold, legally or equitably, under a deed, will, or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the interposition of another estate, of the same legal or equitable quality, to his heirs, or heirs of his body, as a class of persons to take in succession from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate. See 15 B. Monr. (Ky.) 282; Hargrave, Law Tracts, 489, 551; 2 Kent, 214.

If the limitation be to the heirs of the body, he takes an estate tail; if to heirs generally, a fee-simple. 1 Day (Conn.), 299; 2 Yeates (Penn.), 410.

It does not apply where the ancestor's estate is equitable and that of the heirs legal. 1 Curt. C. C. 419.

Kent's eloquent apostrophe to its departed glories: "The juridical scholar, on whom his great master, Coke, has bestowed some portion of the 'gladsome light of jurisprudence,' will scarcely be able to withhold an involuntary sigh, as he casts a retrospective glance over the piles of learning devoted to destruction by an edict as sweeping and unrelenting as the torch of Omar. He must bid adieu forever to the renowned discussions in Shelley's Case, which were so vehement and so protracted as to rouse the sceptre of the haughty Elizabeth. He may equally take leave of the multiplied specimens of profound logic, skillful criticism, and refined distinctions, which pervade the varied cases in law and equity, from those of Shelley and Archer, down to the direct collision between the courts of law and equity, in the time of Lord Hardwicke. He will have no more concern with the powerful and animated discussions in Perrin v. Blake, which awakened all that was noble and illustrious in talent and endowment, through every precinct of Westminster Hall. He will have occasion no longer, in pursuit of the learning of that case, to tread the clear and bright paths illuminated by Sir William Blackstone's illustrations, or to study and admire the spirited and ingenious dissertations of Hargrave, the comprehensive and profound disquisition of Fearn, the acute and analytical essay of Preston, the neat and orderly abridgment of Cruise, and the severe and piercing criticisms of Reeve. What I have, therefore, written on this subject may be considered, so far as my native state is concerned, as a humble monument to the memory of departed learning." 4 Kent, 267, 10th ed.; 233, 12th ed.

As it is with the morality, history, usefulness and presentation of *Shelley's Case*, so it is with a thousand questions. See Observations: EQUITY; Dovaston: 217.

"Heirs," "legal heirs," "heirs of the body" meaning of. Dukes, 37 S. C. 255, 34 Am. St. 745, n., 1 Wash. R. P. 85, 4 Kent, 5-8, 210-214.

Rule in Shelley's Case. Perrin v. Blake (1770), Hargrave's Law Tracts, 489, 4 Burr. 2579, 1 Wm. Bl. 672, 10 Rul. Cas. 689, Bro. Max. 451; Kent; Jesson v. Wright (1820), 2 Bligh. 1, 21 R. R. 1, 10 Rul. Cas. 714; Grainger, 147 Ind. 95, 36 L. R. A. 186, n.; Hageman, 129 Ill. 164, 7 Am. Prob. R. 60, n.; Kuntzman, 136 Pa. 142, 20 Am. St. 909,

Shelley's Case.—

7 Am. Prob. R. 50, n.; Starnes, 112 N. C. 1, 22 L. R. A. 598; Carpenter, 127 Ill. 42, 11 Am. St. 92-107, n., 42 L. R. A. 455 (discussing Shelley's Case); Earnhart, 127 Ind. 397, 7 Am. Prob. Rep. 123, 22 Am. St. 652, n.; Hughes, 70 Md. 484, 14 Am. St. 377, n. (applies to leasehold estates); De Vaughn, 165 U. S. 566. Estate in "*fee simple*" or "*absolute*" means in fee only, and an estate of inheritance by the grantee's heirs. 4 Kent, 1-22, 10 Rul. Cas. 673-891. "Heirs" necessary in a deed to create an estate of inheritance, but otherwise in a will. Melick, 44 N. J. Eq. 525, 6 Am. St. 901, n.

The policy of feudal tenures created its own rules of construction, and of course that policy was opposed to that of the civil law and of the common law. Its needs originated such rules as *Shelley's Case*. The effectiveness of the common-law instrument was aided by *Verba fortius*, etc. See Sturdivant: 410. One policy would defeat a conveyance if possible, while the other would conserve it if possible. The rule in *Shelley's Case* and against perpetuities arises from incongruous and opposing policies. Reference to *Dumfries's Case* shows that it was decided for a policy of abolishing conditions against alienation. When *Shelley's Case* is comprehended from the statute *De Donis*, and that a male estate in *fee simple* inalienable was the genius of the feudal system, then he sees a case that stood for the perpetuation of the feudal government. But when this passed away there should apply *Cessante ratione*, etc. *Ut res magis valeat quam pereat*.

SHERIFF: 2 Gr. Ev. 580-599. Liable for deputy wrongfully killing one he is trying to arrest. Johnson v. Williams (1901), 111 Ky. 289, 54 L. R. A. 220, n. See 2 Bouv. 992; And. Dic.

SHERMAN v. KITS MILLER: L.C. 305.

SHERIDAN v. ROUSTON: L.C. 407.

SHIPLEY v. FIFTY ASSOCIATES (1870), 106 Mass. 194, 8 Am. Rep. 318; cited in works on torts, negligence, trespass, damages (3 Suth. Dam. 872) and personal injuries.

Landlord is liable for ice and snow falling from the roof of premises he leases, upon passengers upon the sidewalk. Fletcher v. Rylands (cited and discussed); Todd; Sic utere, etc.; Squib Case; Salisbury.

SHIPS; SHIPPING: Rights of part owners; contract to surrender control is an illegal contract. Smith-Green Co. v. Bird (1902), 96 Me. 425, 90 Am. St. 352-410, ext. n.

SHOEMAKER v. JACKSON (1905), 128 Ia. 488, 1 L. R. A. (N. S.) 137-141, n. Assault and battery; provocation; cooling time; recoupment.

Shoemaker stated: This is a Romeo and Juliet case as told in law. W. and S. were infants, also J.'s daughter—all in their "teens." W. and the latter were greatly in love, who with S. planned a nocturnal elopement and a wild ride escapade. S. on the night of July 29th was on hand with a ladder and actively assisted "Juliet" from her chamber window and to the livery rig in waiting, also the youthful W. They were pursued and were captured on the 30th. The strain and excitement made "Juliet" sick; her clothing was also damaged. The pursuit was expensive, the clothes were damaged and the girl had to

Shoemaker v. Jackson.—

have a doctor and there was also the lawyer's "loss of service" in the case of parent and child.

On July 31st J. called S. in an office and flogged him with a whip ("a rod in pickle") provided for the purpose. For this S. sued J., who of course pleaded "loss of service," the doctor's bill and the damage to the clothes, also justification. All but the latter plea "passed the general demurrer." They were not too remote. The doctrine of the "Squib Case" was applied. "One is presumed to intend the natural, direct and probable consequences of his act." But J. failed in his plea of justification because of "cooling time." This is an element in criminal law and often in homicide cases. This case involves many phases of *In jure non remota*, etc., which is a ground and rudiment of law. §§ 55, 67-68, Gr. & Rud.

This is a most instructive case upon the subject of recoupment. Hadley; Smeed v. Foord; Bennett v. Lockwood; Cooch.

SHOP BOOKS: Bouv. Dic. Books; Price: 213f. Cited, § 272, Gr. & Rud.

SHORTER v. F. (1849), 2 N. Y. (2 Const.) 193, 51 Am. Dec. 288-294, n., H. & T. S. D. (1 Crim. Def.) 256, Beale, C. C. 83; cited, Bish., Moak, Und. Torts, 217; Tiffany v. C. (1888), 121 Pa. 165, 6 Am. St. 775, n.

Self defense. No right to kill to prevent a mere trespass; only to prevent a violent felony. U. S. v. Holmes; S. v. Moore; Hooker v. Miller; Aldrich v. Wright; *Necessitas inducit*.

SHRICKER v. FIELD (1859), 9 Ia. 366. Denials in answers must be certain. Poor: 37.

SHUEY v. U. S.: L.C. 323.

SHUTTE v. THOMPSON: L.C. 291.

SI CITATUS ALIQUIS NON COM- pareat habetur pro consentiente: If, being summoned, a person does not appear, he will be regarded as having consented. 1 Gr. Ev. 18, n. Bro. Max. 138; *Allegans*. An admission upon the record is conclusive. 1 Gr. Ev. 18, 205; Dickson: 34. §§ 49, 198, 255, Gr. & Rud. See RES ADJUDICATA.

SIO UTERE TŪO UT ALIENUM NON lēdas: Enjoy your own property in such a manner as not to injure that of another person. Bro. Max. 365-395; 2 Gr. Ev. 473; 2 Whart. Conts. 786, 792; 2 Kinkead, Torts, 490 (contract view of); Katz, sub WATER; Squib Case; Indemauro: Heaven: stated, 46 L. R. A. 33-122 (obligation of one to keep safe premises. Tiede. Pol. Power, 1, 3, 6, 8; 1 Dill. Corp. 141; Freund, Police Power, 8; Thorpe; Taylor: 219a; Munn (power of legislature over property); Millett v. P. (over contracts); Story v. El. R. R. See Torts; Fletcher (noxious things); May; Loomis (ferocious animals); Van Leuven (trespassing animals). Obligations springing from the social state. Farwell v. R. R.; Brown, sub Fletcher; Saint Helen's Smelting Co. (offensive occupations); Salisbury; Todd (landlord and tenant); Busw. Pers. Inj. 76; Howe's Civil Law, 172; Bland, Police Power. Malicious exercise of right. See MALICIOUS ACTS; 67 Cent. Law Jour. 23-28.

Cited, §§ 31, 47, 50, 52, 268, 295, 296, Gr. & Rud.

Firearms; negligent use of. Morgan v. Cox. The principal maxim expresses a mandate for obedience originating in nature,

Sic Utere Tuo.—

and from which great discussions may be traced. Some of these concern the law of easements (Smith); others, torts. Squib Case: cases; Gilson v. Delaware; Chase-moore; Backhouse (water and water-rights); Arkright; Acton; Mason; Mersey Docks and Penhallow; Yates; Burrows; Lynch; Robinson; Hartfield; Thorogood; Waite v. R. R.; Hooker v. Miller; Bird v. Holbrook; Fent; Vaughn v. R. R.; Bennett v. Lockwood; 1 Kent, 338-340; Cole Co. v. Virginia Co.; Thorpe v. R. R. (1854), 27 Vt. 140, 62 Am. Dec. 625-639, n.; 1 Thayer Const. Cas. 157-706; Hay; Erwin, Cas. Torts, 470; 2 Kent; Cool. Const. Lim. (power of legislatures over property). See POLICE POWER.

Duty to restrain noxious elements. Fletcher: cases; M., K. & T. R. R. v. Wood.

Objects of fright, like ferocious animals, owner not liable for. Bostwick, 34 Ind. App. 566, 107 Am. St. 260, n.

One cannot make commercial use of percolating water to the injury of an adjacent owner. See WATER.

Sic utere, etc., lies at the base of great discussions in the law of equitable estoppel. Ewart, Estop. 28-67.

Police power rests upon Sic utere, etc. Lemont, 197 Ill. 363, 90 Am. St. 172.

Many rights and duties are reasoned from this maxim. It is a part of *Salus populi suprema lex*. It is a principle of the prescriptive constitution.

Liability for permitting water to accumulate and freeze on sidewalk to the injury of travelers. Brown, 202 Pa. 297, 58 L. R. A. 321-333, ext. n.; Scott v. Shepherd: cases; Sharp. Dangerous premises; walls liable to fall; owner's liability. Ainsworth, 180 Mass. 397, 57 L. R. A. 132.

Davies v. Mann. Phases of the maxim are discussed in Farwell v. R. R., and from this view-point contract relations may be seen. From such maxims more may be traced; e. g., the covenant for protection. Notes to Lamplough: 301. Collectively considered, interesting and instructive relationships will appear. See Preface, Hughes, Conts.; Carter v. Towne; Scott v. Shepherd. Sometimes liability is founded upon a criminal act (Sallsbury); sometimes negligence (Squib Case, Dixon v. Bell), and sometimes a contract relation. Carter v. Towne; Gilson; St. Helen's Smelting Co.; Shipley; Missouri, K. & T. R. R. v. Wood; Hay (blasting rock); Carey, 129 Fed. 177, 65 L. R. A. 659, n. (dangerous operations).

Sic utere, etc., is one of the universal principles of law. Its basis is well illustrated by a quotation in Hughes' Proc. from C. v. Alger, 7 Cush. 53, 104; cited, Bish. C. L.; *Salus*; St. Helen's; Van Winkle, 52 N. J. L. 240-249; Winterbottom; Heaven. See *Salus populi*, etc.; POLICE POWER; Evansville (limitations upon power of municipal corporations).

Lateral support. Backhouse.

Easements. Smith v. Thackerah.

SIGNATURE: What a sufficient, to a contract. Brown v. Bank: 346; § 32, Hughes, Conts.; Ans. Conts. 57. *How made.* § 312, Gr. & Rud.

One may sign any name he pleases. Brown v. Bank: 346. See Sturdivant: 410: cases.

A person may sign by the hand of another, and oral evidence is admissible to prove. Morton v. Murray (1898), 176 Ill. 54, 43 L. R. A. 529. How agent must sign to bind principal. Sturdivant: 410.

Signature.—

Not necessary to a deed; its seal makes it operative. Ans. Conts. 46, n.; Cooch.

An official bond containing the signatures of the principal and sureties in a justification, and nowhere else, properly delivered and accepted, is valid and enforceable. Town of Tumwater v. Hardt (1902), 28 Wash. 684, 92 Am. St. 901. *Generally:* McClain, C. L. 665, 694, 2 Bouv. Dic. 1001. See NAMES; Brown: 346.

SILENCE SHOWS CONSENT: See ACQUESCENCE; WAIVER; *St. citatus*.

SILENT LEGES INTER ARMA: Laws are silent amidst arms. 4th Inst. 70; Pettibone.

SIMPLE CONTRACT — PAROL CONTRACT: Always requires a consideration. Ans. Conts. 41, 53, 63; DEEDS; Cooch; Rann: 312.

When writing required. See FRAUDS AND PERJURIES.

SIMPLEX COMMENDATIO NON OBLIGAT: A simple commendation does not bind. Dig. 4, 3, 37; 2 Kent, 485; Bro. Max.; L.C. 374-384. See *Caveat emptor*; WARRANTY; Chandelor: 374; Pasley: 375; Seixas, *sub Caveat emptor*; Schuchardt. *Cited*, § 100, Hughes, Conts.; §§ 46, 289a, 294, Gr. & Rud.

SIMPSON v. HARTOFF (1744), Willes, 512, 1 Sm. L. C. 783-796, 437-453, 11 ed. (reviews English cases). *Exemptions*; goods privileged from. See EXEMPTIONS.

SINE POSSESSIONE USUCAPIO PRO-cedere non potest: There can be no prescription without possession. Possession essential for prescription. See POSSESSION.

SINGER MFG. CO. v. CONVERSE (1896), 23 Colo. 247, 251. Particulars control universals; specific statements limit and control general denials. Crater; *Verba generalia*; DENIAL; Dickson: 34.

SINGLENESS, CERTAINTY AND PER-fection of each document—pleading—link of the record, are demanded by the conserving principles of procedure. Counter-claim pleading cannot be an answer. Bow-lus: 100. Each count must be separate and perfect in itself. Bliss, Pl. 121. Haskel: 101.

SI NON APPAREAT QUID ACTUM est erit consequens, ut id sequamur quod in regione in qua actum est, frequentatur: If it does not appear what was agreed upon, the consequence will be that we must follow that which is the usage of the place where the agreement was made. Dig. 50, 17, 34. See *Lex loci*. Incidents annex themselves. See CUSTOM. *Contemporanea*; St. Louis Beef Co.

SISTER STATE JUDGMENTS: Force and effect of. Mills: 57; McElmoyle: 56; Starbuck: 263; Haddock.

SITER v. JEWETT (1867), 33 Cal. 92, 98. Denials; what are sufficient. Dickson: 34.

SIX CARPENTERS' CASE: L.C. 165.

SKATE v. BEALE: L.C. 82.

SKINNER v. BISHOP (1874), 2 Colo. 383 (opposes the views that a record can be waived. Hume. A *placitum* essential for the record proper. See PLACITUM; Stubbings: 49; Planing: 2d. Record proper essentials must affirmatively appear, even in a superior court.

SLACUM v. POMERY (1810), 6 Cranch, 221, 3 L. ed. 205 (Marshall, C. J.).

Pleading; waiver; limitations of. Each material fact must be pleaded. Such defect is not waived. It may be raised on appeal for first time. Whatever is a ground of motion in arrest may be raised on appeal for the first time. Rushton: 5; McAllister: 3; Devine v. Los Angeles. See

Slacum v. Pomery.—

views from Estoppel and Collateral Attack, §§ 171-261, Gr. & Rud.; INDICTMENTS; WAIVER.

What ought to be of record must be proved by record and by the right record. Slacum; McAllister: 3; Rushton: 5; U. S. v. Cruikshank: 232; Bowman; Hitchcock: 12. *Contra*: 2 Cyc. 689-691: cases. See ABATEMENT; APPELLATE PROCEDURE; COLLATERAL ATTACK.

The authority of a judgment must appear. Campbell: 2a; Clem v. Meserole: 2c; Sache v. Wallace; Munday: 79; Smoot's Case; S. ex Rel. Coleman v. Kelly.

A court refused to notice the motion in arrest or general demurrer when presented in the mandatory record. 199 Mo. 159; Planing: 2d.

The ground of the general demurrer cannot be waived. CAUSE OF ACTION; Citation; Mallinckrodt: 12a; Smith v. Burrus; McAllister: 3; Cruikshank: 232; § 242, Gr. & Rud. See Great N. R. R. v. S. (1908), 208 U. S. 452 (may be waived). ALLEGATIONS; Quod ab initio.

SLANDER: § 313, Gr. & Rud.: cases. See DEFAMATION; LIBEL; Pollard; Newell on Def. Accusing one of being a secret slanderer and scandal monger, with betraying his friends and telling lodge secrets, is libelous *per se*. Patton, 72 Ark. 421, 65 L. R. A. 937. Damages in cases of slander. Mech. Cas. Dam. 661-669.

Malicious publication by minister at baptism of bastard as to who was its father. Kurbright v. S. (1902), 44 Tex. Cr. R. 91, 100 Am. St. 157, 58 L. R. A. 959.

Repeating of, is actionable. *Inveniens libellum famosum et non corrumpens puniatur*; Squib Case.

Mutual vituperation as mitigation. Patton, *supra*; Volenti non fit injuria. Not a matter for setoff. Wrege, 13 N. Dak. 267, 112 Am. St. 679-687.

Pleadings, if defamatory, are privileged. Sto. Pl. 267-270; Gore, 87 Md. 368, 67 Am. St. 352; Hastings: 160. See MALICIOUS ACTS; CAUSING DAMAGE; MALICIOUS PROSECUTION.

Generally: 2 Bouv. Dic. 1005, 1006; Pollard: cases.

Slander of property or title. Malachy v. Soper: 25 Cyc. 558-566.

SLAUGHTER-HOUSE CASES, THE (1872), 16 Wall. (U. S.) 36, 21 L. ed. 394, 1 Thayer, Const. Cas. 516, McClain's Const. Cas. 1831, And. Dic. 824, Tiede. Pol. Power; Overshiner v. S., 156 Ind. 187, 83 Am. St. 187.

Sovereign power over conduct and interests of the citizen; limitations. Ford v. S., 85 Md. 465, 60 Am. St. 337, n.; Millett v. P.; Evansville. See POLICE POWER; CONSTITUTIONAL LAW. Cited, §§ 31, 159, Gr. & Rud.

SLOMAN v. WALTER: L.C. 393.

SMART MONEY: 2 Bouv. Dic. 1009; Suth. Dam. Exemplary damages. Wagener: 290; Merest.

SMEED v. FOORD: Sub Hadley.

SMEETING COMPANY v. REED (1897), 23 Colo. 523 (*Res adjudicata* must be pleaded). See *Res adjudicata*. Conclusion of law need not be averred. Smelting; Insurance Co., 24 Colo. App. 221; P. v. Brown: 131. Cf. Hume v. Robinson.

SMITH v. BURRUS (1891), 106 Mo. 94-106.

Statement of cause or of defense must be sufficient, and cannot be waived. Slacum; Campbell: 2; Roden: 12b; Fish: 12c; Chitty v. R. R. *Contra*: Weems (Tex.). Quod ab initio.

A civil suit is a ground of malicious prosecution. S. P., McCauley v. McGinley.

Smith v. Burrus.—

Presumptions stand for evidence and are to be respected and acted on. Lillensheals v. U. S., 97 U. S. 268: cases; Crane v. Morris, 6 Pet. 598; Bonnell: 185.

Defamation of candidates not privileged though done in good faith. See Harrison v. Bush; *Eum qui nocentem*.

Precedents are founded on rudiments of law. 106 Mo. 102.

SMITH v. FLETCHER (1872), L. R., 7 Exch. Div. 305. *In jure*, etc.; Gilson v. Delaware Co.

SMITH v. HODSON: L.C. 156.

SMITH v. MARRABLE: L.C. 382.

SMITH v. MAWHOOD (1845), 14 M. & W. 452, 69 R. R. 724; Mech. Sales, 1051; Chit., Ans., Pars., Ham. Conts.; Mews' E. C. L.; Suth. Stat. 651; Greenh. Pub. Pol. (illegal sales). *Illegal contracts*; Rule stated: Ans. Conts. 172; Smith, Conts. 255; Bartlett. Cited, Hughes, Conts.

Illegal sales in violation of a statute imposing a penalty are not void unless that intention is expressed. *Verba intentione*.

SMITH v. THACKERAY (1866), L. R. 1 C. P. 564, 1 Har. & R. 615, Chase, Torts, 30, Moak, 421, Cool., Bish., 5 Am. Law Reg. (N. S.), 761, n., 3 Gray, Cas. Prop. 79, Mech. Cas. Dam. 20, Shear. Neg., 1 Wat. Tres., 3 Suth. Dam., Wood, Nuis., Thomp. Neg., Bro. Max., Whart., 2 Wash. R. P., 2 Wh. Ev., 3 Kent, 437, 448; Mews' E. C. L.

Easements; right to subjacent and lateral support. See *Ubi jus*; *Sic utere tuo. Pantan v. Holland* (1812), 17 Johns. 92, 8 Am. Dec. 369, 1 Thomp. Neg. 249-282, n., Wood, Nuis. 220, Bish. Torts, 98, 910, 2 Gr. Ev. 230, 466, 2 Wash. R. P. 359, 360.

Thurston v. Hancock (1815), 12 Mass. 220, 7 Am. Dec. 57, n., Bigl. Lead. Cas. Torts, 527-535, Chase, Cas. Torts, 23, 3 Am. Lead. Cas. Real Prop. 252, 33 L. R. A. 49, 33 Am. St. 439, 476, 2 Dill. M. Corp. 992, 2 Gr. Ev. 467, Cool. Torts, Bish.; 3 Suth. Dam., Kent.

Gilmore v. Driscoll (1877), 122 Mass. 199, 1 Thomp. Neg. 254-282, ext. n., 23 Am. Rep. 312-322, 2 Gray, Cas. Prop. 89, Suth. Dam., Bish. Torts; Green, 105 Cal. 52, 45 Am. St. 25-29, n.

Humphries (or Humphries) v. Brogden (1850), 12 Q. B. 379, 1 Eng. Law & Eq. 251, Bigl. L. C. Torts, 536, 538, 1 Thomp. Neg. 263-282, n., 2 Gray, Cas. Prop. 66, 17 Rul. Cas. 401, 10 Rul. Cas., q. v., 2 Wat. Tres. 735, Moak, Torts, 410, 419, Cool., Wood, Nuis. 176, 3 Suth. Dam., Ang. Wat., Gould, Wat., Whart. Neg., Shear. Neg., 1 Add. Torts, Cool. Const. Lim., 2 Wh. Cr., 1 Wash. R. P., 2 *id.*, Bro. Max. 371; Mews' E. C. L.

Mining. Right of mine owners to remove support from other mines is liberally viewed. Smith, 7 C. B. 515 (62 E. C. L. R.), Bro. Max. 372. See Baird v. Williamson (1863), 15 C. B. (N. S.) 376, 109 E. C. L. R.; Davis, 131 N. C. 352, 92 Am. St. 781, n. (notice to interfere with lateral support).

SMITH v. WILSON: L.C. 401.

SMOOT'S CASE (1872), 15 Wall. 36-51; cited, §§ 88, 99, 118, Gr. & Rud.

Jurisdiction depends upon the subject-matter described, and is not to be enlarged or diminished by a court. The court of claims can only act upon a contract express or implied. *De non apparentibus*; *Verba fortius*; Quod ab initio; Montana: 10b; Slacum; Smith v. Burrus; Sache.

Contracts with the government are construed by the ordinary rules of construction. Courts cannot dispense with them. A court

Smoot's Case.—

is bound by its record. See MANDATORY RECORD.

SMOUT v. ILBERRY (1842), 10 M. & W. 1, 62 R. R. 510, Keener, Conts. 336, 337, 1 Am. Lead. Cas. 769, 5th ed., Bro. Max. 823, Bigl. Lead. Cas. Torts, 22, 2 Smith, L. C. 393, 2 Kent, 646, Ans. Conts. 360, Smith, 447; Mech., Sto., Whar. Ag., Rand. Com. Paper, 3 Suth. Dam., 1 Pars. Conts., Bish., Chit., 1 Add., 2 Pom. Eq., 1 Beach, Corp., 2 Gr. Ev. 230a; Mews' E. C. L. Cited, § 184, Hughes' Proc.

A mutual mistake, where the facts are equally open to both parties, and who are acting bona fide, creates no liability. Ignorantia facti excusat.

Death of the principal revokes the agency. *Smout; Hunt.* Leaving the third party without a remedy upon contracts entered into by the agent when ignorant of his principal's death. *Smout; Ans. Conts.; Duncan, 32 Ill. 532, 83 Am. Dec. 293, n. See CONTINUITY; ASSENT; Non hæc.*

Necessaries of wife. Cash loaned wife to buy necessities; husband not liable for. *Skinner, 159 Mass. 474, 38 Am. St. 447, n.* Her power to bind is one of agency. *De Benham; Manby; Jolly; Seaton; Montague; Wannamaker. See HUSBAND AND WIFE.* They must be necessitous. *Hunt v. Hayes (1891), 64 Vt. 89, 33 Am. St. 917.*

Public agents. Powers of, must be taken notice of. *Clark v. Des Moines; Lakeman v. Mountstephen; Houston v. Clay Co. (1862), 18 Ind. 396; stated, 1 Dill. Munic. Corp. 238, n.; Duncan v. Niles (1863), 32 Ill. 532, 83 Am. Dec. 293, n. See Hitchcock: 12; Beard v. Hopkinsville.* Assent is essential for a contract. *Boston Ice Co.: 320. Non hæc.*

SNYDER v. WILLEY: Stenographic reports and surplage make faulty record matter. *R. R. v. Stewart: 290a; § 12, Hughes' Proc.*

SODERBERG v. KING CO.: See MONEY HAD AND RECEIVED.

SODOMY: Bouv., And. Dic., 2 Bish. Cr. Proc. 1013-1081a, 1191-1198; *R. v. Jellymann (1838), 8 C. & P. 604 (34 E. C. L. R.), 2 Jac. Fish. Dig. 3623, 3753; Lewis v. S. (1896), 36 Tex. Cr. Rep. 37, 61 Am. St. 831, n.; P. v. Hodgkin (1892), 94 Mich. 27, 34 Am. St. 321; McClain, C. L. 1153-1155.*

SOLICITOR AND CLIENT: A relation that suggests undue influence. See *Keech v. Sandford; ATTORNEYS.*

SOLO CEDIT QUOD SOLO IMPLANTATUR: What is planted in the soil belongs to the soil. *Bright v. Boyd. Solo cedit, etc.; Quicquid plantatur, etc.*

SOLO CEDIT QUOD SOLO INÆDIFICATUR: Whatever is built on the soil belongs to the soil. Inst. 2, 1, 29. See 1 Mack. Civ. Law, § 268; 2 Bouv. Inst. n. 1571; *Bright v. Boyd; Solo cedit, etc.; Quicquid plantatur, etc.*

SON ASSAULT DEMESNE: Bouv. Dic. See ASSAULT AND BATTERY.

SOUL: Reason is the soul of the law. *Cessante ratione, etc.; Pari ratione, etc.*

SOUTH CAROLINA v. U. S. (1905), 199 U. S. 437-472.

Cited, §§ 267-268, Gr. & Rud. State agencies unless governmental may be taxed by the federal government, e. g., if a state engages in the sale of things taxed by the general government, like whiskey. *Verba intentione, etc.*

"The old argument often heard, often repeated and in this court never assented to, that when a question of the power of con-

South Carolina.—

gress arises, the advocate of the power must be able to place his finger on words which expressly grant it. The brief of counsel before us, though directed to the authority of that body to pass criminal laws, uses the same language. Because there is no express power to provide for preventing violence exercised on the voter as a means of controlling his vote, no such law can be enacted. It destroys at one blow, in construing the Constitution of the U. S., the doctrine universally applied to all instruments of writing, that what is implied is as much a part of the instrument as what is expressed." *Ex parte Yarborough, 110 U. S. 651, 658, quoted 199 U. S. 451.*

This case may be cited to sustain liberal construction (*M'Culloch: 147*), also to show that a prescriptive constitution guides. *Church; State v. Sheppard. See Brown v. Tharpe; Rison: 253; Blair: 254.*

The constitution is always to be construed the same. *Dred Scott Case; 199 U. S. 449.*

Is uniformly construed. 8 Cyc. 732.

SOUTHERN BUILDING AND LOAN Ass'n v. Dawson (1896), 97 Tenn. 367, 56 Am. St. 804-810.

Elevators. The obligation to passengers is the same as that of a common carrier. *Southern Case, supra; Coggs v. Bernard: 350; Ingalls v. Bills: 353; Treadwell v. Whittier (1889), 80 Cal. 574, 5 L. R. A. 498, n.* Leaving elevator open and unattended is similar to dangerous pitfalls, or excavations. *Southern Case, supra; Indemaur v. Dames; Fisher v. Thirkell.*

SOUTHERN v. KELLERMAN (see *Smith v. Wilson*), L.C. 402.

SOVEREIGNS: Regnal years of. Bouv. Dic.

SOVEREIGNTY: As the creator and ordainer of courts. See GOVERNMENT; DIVISION OF STATE POWER; SUPREME LAW. Claims against. What claims constitute valid demands against a state. *Northwestern, etc. Bank v. S., 18 Wash. 73, 42 L. R. A. 33-74. See Rex non potest peccare; Roy n'est, etc. Hunsaker: 259; STATES: Cyc.; Hunsaker: 259.*

Remedies against. § 64, Gr. & Rud. As parties. §§ 99, 152, Gr. & Rud.

Important rationale. See *Coram Judice. Mandates of the supreme law of the land. Suth. Stat. 29. See CONSTITUTIONS.*

General demurrer is the sovereign's pleading. See *Coram Judice; DEMURRER; Quod ab initio.*

Amicus curiæ may appear and speak for. See *Amicus curiæ.*

Amicus curiæ, functions of. See *Id.* Law of the case; rules of, do not apply to.

Martin: 246. See *Coram Judice.* Title and rights of are preferred. *Quando*

jus domini, etc.; GOVERNMENT. Can only be sued with its consent. And.

Dic. (Sutor); *Hunsaker: 259; Atlantic Coast Line, 200 U. S. 273; Dicey, Parties 1-5.*

Ignorance is not favored. See *Ignorantia. Immorality; inquiry offensive to. Summa ratio, etc.*

In *pari delicto* defenses need not be pleaded. *Holman: 363; Field: 84.*

False, sham and covinous pleadings offensive. *Graver: 103; Rensberger v. Britton; Weltmer: 268a.*

Immorality repressed by postal laws; copyright laws also. See IMMORALITY.

Power to contract. Ans. Conts. 104, n. Remedy against. *Id.*, 104 n.

Right to suc. See *Rex non potest peccare; PETITION OF RIGHT.*

Generally: 2 Bouv. 1016; And. Dic.

SPALDING v. VILAS (1895), 161 U. S. 483-499, 40 L. ed. 780. Malice or corrupt motive by officers is no actionable element. Public officers have absolute immunity for official acts, although they act from a malicious or a corrupt motive. *Lange v. Benedict*: 159; *Yates v. Lansing*; *Randall v. Brigham*, cited 161 U. S. 493, also *Bradley v. Fisher*; *Fray v. Blackburn*; *Scott v. Stansfield*; *Dawkins v. Paulet*, L. R. 5 Q. B. 94; *Dawkins v. Rokeby* (1873), L. R. 8 Q. B. 255, 262. *Judicial officers; immunity of*. *Lange*: 159; *Garff*, 31 Utah, 102, 120 Am. St. 924-929, n.

SPARF v. U. S.: See *S. v. Croteau*: 271.

SPECIALIA GENERALIBUS DEROGANT. See *Generalibus*, etc.

SPECIALTY: See *DEEDS*; *SEAL*.

SPECIFIC DELIVERY CHATTELS: See *Pusey*: 276.

SPECIFIC PERFORMANCE: *Seton v. Slade* (1802), 7 Ves. 265, 32 Eng. Reprint, 108, 2 White & Tud. L. Eq. Cas. 1041-1156, ext. n.; *Tate*, 36 Fla. 439, 53 Am. St. 251, n.; *Beach, Confs.*, 2 Beach, Eq. 566-637. See *Seton*, cited in equity works; *Lester*: 341; *Pusey*: 276. See *SALE*; 2 Beach, Confs. 878-962. Court unable to enforce a contract. *Standard Fashion Co.*, 157 N. Y. 60, 68 Am. St. 749-762. See *CANCELLATION*; *RESCISSION*; *REFORMATION*. 2 Bouv. Dic. 1020-1023. Of gratuitous promise under seal, not granted. *Ans. Confs.* 50. Part performed contract. See *FRAUDS AND PERJURIES*. Infants; not granted against. *Ans. Confs.* 111. Fraud is a ground of resistance. *Ans. Confs.* 163. Sometimes withheld in a case of mistake. *Ans. Confs.* 131, 249.

Of contract for sale of goods. *Ans. Confs.* 313. *Of sale of land*. *Ans. Confs.* 313. *Of stock in corporation*. *Ryan*, 91 Md. 175, 50 L. R. A. 50.

General rules relating to it. *Ans. Confs.* 313.

Description of the tract is essential. *Henry*, 210 Pa. 245, 105 Am. St. 802, n. *Options*. *Mier*, 148 Mich. 488, 118 Am. St. 586-606, ext. n. *Cooke*: 321.

Not essential for due process of law. *Howard v. Ky.*

SPEEDY TRIAL: Person's right to. *Begerow*, 133 Cal. 349, 85 Am. St. 178-204, ext. n.

SPENCER'S CASE (*Spencer v. Clark*) (1583), 5 Rep. 61, 1 Sm. L. C. 145-237 (covenants: kinds and construction of). See *COVENANTS*. Cited, §§ 144, 148, *Hughes, Confs.*

Running with the land. *Atlanta R. R.*, 124 Ga. 929, 110 Am. St. 215-222 (cites *Spencer*).

SPENDTHRIFT: May contract unless forbidden by statute. *Whart. Confs.* 124; 1 Pars. Confs. 388. *Condition that property shall not be subject to execution is void*. *Hutchinson*, 100 Va. 169, 93 Am. St. 944-955, ext. n. See 2 Bouv. Dic. 1023, 1024.

SPENDTHRIFT TRUSTS: *Garland*, 87 Va. 758, 24 Am. St. 682-697, n.; *Ghormley*, 139 Pa. 584, 23 Am. St. 215, n., 11 L. R. A. 565; *Leigh*, 69 Miss. 923, 18 L. R. A. 49, n.

SPERRY v. C. (1838), 9 Leigh (Va.), 623, 1 Lead. C. C. (B. & H.) 433-482, ext. n., 33 Am. Dec. 261, 262. §§ 104, 105, 142, 167, 174, *Hughes' Proc.*

Defendant charged with felony must be present at each step in procedure and the record proper must show this, as it must also show the issue. *Hoskins*: 80; *Bailey, Jurisdic.* 72.

Sperry v. C.—

The record proper is for protection and is to insure the guarantee of due process of law. *Max. No. 1*; §§ 51-77, *Hughes' Proc.*, *Cool. Const. Lim.* 388; *Richards v. S.* (1892), 91 Tenn. 723, 30 Am. St. 907; *S. v. Kelly* (1887), 97 N. C. 404, 2 Am. St. 299, 11 Crim. Law Mag. 173-178; *George v. S.* (1889), 52 Ark. 285, 5 L. R. A. 832, n.; *S. v. Atkinson* (1894), 40 S. C. 363, 42 Am. St. 377, n.; *French v. S.* (1893), 85 Wis. 400, 39 Am. St. 855, 21 L. R. A. 402; *S. v. Smith* (1890), 44 Kan. 75, 21 Am. St. 266, 8 L. R. A. 774, n.; *Ball v. U. S.* (1891), 140 U. S. 118; *White v. U. S.* (1896), 164 U. S. 100, 41 L. ed. 365, n. (an issue must likewise appear); 1 *Bish. Crim. Proc.* 267-277, 2 *id.* 1347, 1353, *Wh. Pr.* 540-551, *Clark, Proc.* 148, *Arrano v. P.* (1897), 24 Colo. 233; *Munday*: 79; cases; *Crain v. U. S.*

SPIES v. F.: "Anarchist Case" (1887), 122 Ill. 1-267, 5 Am. Cr. Rep. 637-654 (in trial court), 6 *id.* 570-715, 3 Am. St. Rep. 320-492, ext. n., 9 Crim. Law Mag. 829-934, n., 6 Am. Crim. Rep. 570; *Bish. C. L.* Cited, § 13, *Hughes' Proc.* *Spies* (1887), 123 U. S. 131, 10 Cr. Law Mag. 44-59 (federal review). Cited, § 309a, *Hughes' Proc.* §§ 49, 55, 293, 294, *Gr. & Rud.*

Spies stated: Conspiracy; its rationale. U. S. v. Cassidy. *Spies* was tried and executed for murder, from this state of fact: He and other conspirators, through a long period of time, had called around them impressionable and revolutionary spirits and incited them to arm themselves and resist the constituted authorities. Like the *Cassidy* Case the evidence is voluminous, but we may judge its import from the following excerpt (122 Ill. 17), to wit:

June 20, 1885. "Enough is now said about the importance of being armed, and another question approaches us which also must be discussed. We are to go to work to supply ourselves, as quickly as possible, with these useful things. The price of them is too high that one could buy them himself. The writer of these lines expresses his opinion, which does not intend to be too previous, to this effect: That special groups ought to form themselves to this end, which are to accomplish these things incorporeal, and which collect and pay the money in small sums, optional with each one, according to his means. Small contributions one can easily spare. One does not mind them, and he is, in this way, the sooner in fighting trim for our purposes. In explanation, it must also be said that dynamite bears several names here in America. Among others, it is known in the trade also under the names of hercules powder and giant powder. But we will not tire the reader any longer, and go about to close this article. The fable reports to us that the founders of great and difficult works have been nursed by wild beasts,—among others, Romulus and Remus by a she-wolf. That is to be understood figuratively. It is not said that the founders of a great work must have something wolfish in their individuality, for such a beginning is ever the password in a fight, and in this it is meant for one to be a wild animal. Workingmen, fellows in misery, men of action! a creation greater, more important, higher, more elevated than one has ever been, it is for us to found and establish!

Spies v. P.—

"The temple of the unveiled Goddess of Liberty upon the whole face of the globe. But to this end you must be wolves, and, as such, ye need sharp teeth. Working-men, arm yourselves!"

Combination, like intent and malice, is proved inductively by res gestæ facts. Drake, 76 Fed. 140; Tucker, 151 Ind. 332, 44 L. R. A. 129, 3 Gr. 90-92; Spies and Cassidy cases. Lodge, 77 Vt. 294, 107 Am. St. 765-790, n. See CONSPIRACY.

The Spies and Cassidy cases are able expositions of the ideas in *Probatæ extremis, Res ipsa loquitur, Ex uno disces omnes, and Verba intentione debent inservire*. From the highly incriminating evidence inferences were drawn, and agreeably to the rule that "one is presumed to intend the natural, direct and probable consequences of his act."

Circumstantial evidence cannot be dispensed with; it is essential in the due administration of the laws. Knowledge and intent are inferred from conduct and facts proved. See Standard Oil Case (1908), — Fed. —. Cf. Hickory: 194. *Stabit præsumptio*.

Persons incited by such addresses threw bombs and killed several policemen and for this Spies and others were indicted. The only evidence to convict them with the *corpus delicti* was such testimony as is above indicated. Held, it was sufficient, and that it showed they were accessories before and during the fact; in other words, principals; and that they had aided and counseled the commission of the specific acts. The rationale of proving conspiracy is the same in both civil and criminal cases.

Conspiracy, tacking, and collateral intent. Actus non facit reum nisi mens sit rea; R. v. Jordan; R. v. Orton; R. v. Coney; R. v. Serne; U. S. v. Cassidy; S. v. Smith; 2 Best, Ev. 434.

Unlawful homicide in the commission of an unlawful act. Johnson v. S., 66 Ohio, 59, 90 Am. St. 564, 583, ext. n.; R. v. Longbottom; R. v. Lowe; P. v. Lawrence, 143 Cal. 148, 68 L. R. A. 193-223, ext. n.; R. v. Coney; R. v. Orton; R. v. Serne.

Conspiracy; responsibility for unforeseen homicide committed in furtherance of original design. Lamb v. P. (1880), 96 Ill. 73, 3 Crim. Law Mag. 472-489, n. See Squib Case; 2 Best, Ev. 434.

When several are jointly liable, judgment against one is a bar to the others. Mason, 73 U. S. 231.

All who aid, countenance and advise the commission of crime are liable. S. v. Poynter (1884), 36 La. Ann. 572, 6 Crim. Law Mag. 350-355, n. Fleschl invented the machine, Morey devised a use for it—to kill Louis Philippe—and Pepin furnished the necessary funds for its completion. All were guilty.

Withdrawal from participation in crime, which will relieve from criminality. S. v. Forshea (1905), 190 Mo. 296, 4 L. R. A. (N. S.) 576-589.

Declarations of conspirators as evidence. U. S. v. Gooding: 202; 68 L. R. A. 220-223.

Fraud. Same rationale is applied in. Bigl. Fraud, 378. Unlawful assembly. S. v. P.; P. v. Most (1891), 128 N. Y. 108, 26 Am. St. 458. See ELECTION OF REMEDIES.

SPLITTING CAUSES OF ACTION:

See RES ADJUDICATA; MERGER; RECOURSEMENT; Kirven; Mondel: 77; Bendernagle; Pakas, 184 N. Y. 211, 61 Cent. Law Jour. 287, 63 id. 81, 3 L. R. A. (N. S.) 1042, 112 Am. St. 601; Perez, 23 Cyc. 376-451; U. S. Land Co., 192 U. S. 355; Ruckman, 69 L. R. A. 482; Hahl v. Sugo; C. v. Roby; Guedel v. P.; Gebbert, 35 Mont. 451, 119 Am. St. 864. § 136, Hughes' Proc.

Joinder of cause is often required. See JOINDER; *Interest reipublicæ ut sit finis litium*.

Injury to both person and property by same start; both are items of the same cause. King v. R. R.

New suit on different grounds. Barnes v. Huntly, 188 Mass. 274, 108 Am. St. 471, n.

Joinder and splitting of causes. 23 Cyc. 376-451.

Counterclaim; defence of can not be made to successive notes. Case Co., 144 N. C. 527, 119 Am. St. 983.

SPOILIATOR: *Omnia præsumuntur contra spoliatorem*; Armory: 180; Bro. Max. 938; And. Dic.

SPONTE VIVUM FUGIENS MULIER *et adultera facta, dotti sua careat, nisi sponte retracta*: A woman leaving her husband of her own accord, and committing adultery, loses her dower, unless her husband takes her back of his own accord. Co. Litt. 37.

SPRAIGUE v. THOMPSON: L.C. 236.

SPRING COMPANY v. KNOWLTON: L.C. 366.

SPRINGER v. SHAVENDER: L.C. 24.

SQUIB CASE: See SCOTT v. SHEPHERD, ante.

STABILITY OF LAW: See STARE DECISIS; *Ubi jus incertum*; GOVERNMENT; CONSTITUTIONALISM.

STABIT PRÆSUMPTIO DONEC PROBETUR IN CONTRARIUM: A presumption will stand good until the contrary is proved. Bonnell; 185; cases: Smith v. Burrus.

STACKPOLE v. ARNOLD: Sturdivant: 410.

STAKEHOLDER: 2 Bouv. Dic. 1026; And. Dic. See WAGERS.

STALE: And. Dic. 963. LACHES.

STAMP: Efficacy of unstamped instrument in criminal prosecutions. Thomas v. S., 40 Tex. Crim. Rep. 562, 46 L. R. A. 454, n.

Unstamped instruments not void. Wingert, 91 Md. 318, 80 Am. St. 456. May be admitted in state courts. Small, 112 Ga. 279, 81 Am. St. 50, n. Effect of omission to stamp an instrument on which the law requires a stamp, or to cancel the stamp upon such an instrument. Knox, 25 Nev. 96, 48 L. R. A. 305-320, ext. n. Use of, in violation of revenue laws. McClain, C. L. 1350.

Generally: See 2 Bouv. Dic. 1026; And.

STANDARD OIL CO. v. U. S. v., q. v.

STAPILTON v. STAPILTON (1739), 1 Atk. 2, 26 Eng. Reprint, 1, 2 L. Eq. Cas. 1675-1738, ext. n., 12 Rul. Cas. 100-138, n. Cited, Chit. Conts.; Pars., Ans., Bish., Pom. Eq. Sto., Bishp., Beach, Bigl. Fraud, Kerr; 17 R. I. 406, 13 L. R. A. 604, Perry, Trusts; Bailey, 167 Pa. St. 569, 46 Am. St. 691; cases. See § 122, Hughes, Conts.

STARBUCK v. MURRAY (A record must be founded on *bona fide*, not criminal proceedings, to be *coram iudice*): L. C. 263.

STARE DECISIS NON QUIETA MOVERE: Adhere to decided cases, and do not agitate matters which have been established. *Truxton v. Felt Co.*, 73 Am.

Stare Decisis.—

St. 81-106 ext. n.; *Suth. Stat.* 310, 313, 320; *Milligan's Case* (*Ita lex scripta est*). §§ 12, 13, 179, 180, *Hughes' Proc.*; *cited*, §§ 48, 61, 122, 152, 208, 240, 310, Gr. & Rud.

Permanent laws are essential for liberty and resulting happiness. A government must establish laws and adhere to them; upon stability of law depends a constitutionalism. Uncertain or fluctuating laws are inimical to the beneficent administration of government. *Federalist*, No. 62 (*Hamilton*, 1788); *Cool. Const. Lim.* 65, n.; *Pow. App. Proc.* 6; *Bro. Max.* 85, 87; *Omnis innovatio plus novitate perturbat quam utilitate prodest*; 35 *Wis.* 516, 562, 563, 576, 580, 583.

Ubi jus incertum, ibi jus nullum; Ita lex scripta est; *Dash*; *Lex est misera*, etc.; *Melius est jus deficiens quam jus incertum*; *Si a jure discedas, vagus eris*, etc.; *Res est misera*, etc.; *Nihil in lege intolerabilius*, etc.; *Nihil infra regnum*, etc.; *Interest reipublicæ*, etc.

The conserving principles of procedure depend upon fixed and certain laws. See CONSTITUTIONALISM; GOVERNMENT; PLEADINGS; PROCEDURE; RECORDS; *Ita lex scripta est*. §§ 2, 3, Gr. & Rud.

For certainty of law there must be the mandatory record, and from it no departure or variance. See DEPARTURE; VARIANCE; WAIVER; CONSTRUCTION; *Cujus est instituere*, etc.

Supreme courts are created to establish equal and uniform law. *Martin*: 246. See GOVERNMENT.

The question of fixed and certain laws is always one of wise administration and profoundly involves the durability and usefulness of government. See LITERATURE; MAXIMS; PROCEDURE.

Courts should overrule blunders and unreasonable decisions. *Jasper*, 142 *Ind.* 573, 39 *L. R. A.* 58, 2 *Bouv. Dic.* 24, 1 *Bish. New Crim. Law*, 18, 19, 73 *Am. St.* 98, 99; *Springer*: 24; *Ashby*: 273.

No stare decisis against constitution. *Pollock*. See *Ita lex scripta est*; *Bronson*: 238; *Milligan's Case*; *LAW OF THE CASE*. *Precedents*. 2 *Bouv. Dic.* 719-723. Weight and binding effect of other decisions. *Cool. Const. Lim.* 66, 6th ed., *Bro. Max.* 84, 85, 1 *Kent*, 473-477, 1 *Bish. Cr. Proc.* 22, 23; *Wells, Res. Adj.* 581-637; *Pow. App. Proc.* 6, 7, 28. Courts are not bound by blunders. 1 *Bish. C. L.* 140, n. *Quæ contra rationem juris introducta sunt, non debent trahi in consequentiam*: Things introduced contrary to the reason of the law ought not to be drawn into precedents. *Quæ legi communi derogant stricte interpretantur*: Those things which derogate from the common law are to be construed strictly. See STARE DECISIS.

Absence of precedent is no ground for declining jurisdiction to protect a right. *Gavin*, 171 *Ill.* 640, 40 *L. R. A.* 776; *Ashby*: 273; *Piper*: 114.

A county liable in contract like a person. *Hyatt*, 100 *Am. St.* 354, *sub Hill v. Boston*.

In consuetudinibus non diuturnitas temporis sed soliditas rationis est consideranda: In customs, not the length of time but the strength of reason should be considered. *Scientia scolorum*, etc.; *Scire leges*, etc.; *Ignoratis terminis*, etc.; *Yates*, 9 *Johns.* 395, 428; *Driggs*, 11 *Wend.* 504, 507; *Bates*, 23 *id.* 336, 340; *Moore*, 25 *id.* 119, 142; *Hanford*, 4 *Hill*, 271, 323; *Taylor*, 4 *id.* 592, 595; 2 *Bouv. Dic.* 1028, 1029, *Black, Stat.* 401-427, *Cool. Const.*

Stare Decisis.—

Lim. 60-68. Doctrine of stare decisis has been said not to apply in matters of practice. *Baker*, 62 *Wis.* 615.

Courts cannot change long established rules of evidence. *Wrynn*, 27 *R. I.* 454, 4 *L. R. A. (N. S.)* 615. See MANDATORY RECORD.

STATE: See SOVEREIGNTY; GOVERNMENT. 2 *Bouv. Dic.* 1029-1031, *And. Dic.*

Parties to suits. *Missouri v. Ill. & Sanitary District* (1901), 180 *U. S.* 208; cases; 200 *U. S.* 526; *Georgia v. Tennessee Co.* (1907), 206 *U. S.* 230; *Va. v. W. Va.*, 206 *U. S.* 290; 40 *Wis.* 200. § 152, Gr. & Rud.

Unless named to be bound, federal constitution does not apply to. *Barron*: 241.

No citizen can sue a state against its consent. But one state may sue another. *Va. v. W. Va.* (1907), 206 *U. S.* 290; *North Dakota v. N. C.*; *Kansas v. Colo.* (1907), 206 *U. S.* 46-118; *S. D. v. N. C.* (1904), 192 *U. S.* 8, 286; 315-331 (discussing *Chisholm*); *Chandler* (1904), 194 *U. S.* 590.

STATEMENT OF THE CASE: See

CAUSE OF ACTION; IDENTIFICATION; CERTAINTY; *Citatio*; *Quis quid*. Is the body of the pleading, and it controls all incidentals. Controls the caption, if there is disagreement. *Mississinewa*. Must be in concise language. *Sturges*: 111.

Prayer immaterial except where there is no appearance. See *Russell v. Shurtleff*; *PRAYER*.

STATE CASES: S. stands for State; C. for Commonwealth; R. for Rex or Regina (King or Queen); P. for People; U. S. for United States.

S. v. BACON: See REFRESHING MEMORY.

S. v. BAKER (1871), 65 *N. C.* 332, 1 *Bish. C. L.* 25; *S. v. Vannoy*, 65 *N. C.* 532 (aff'g *S. v. Baker*).

Assault and battery; what is. *Stephens v. Myers*; *Bird v. Jones*, *sub Stephens v. Vannoy*.

S. v. BAUGHMAN (Due process of law, what is; division of state power; fictitious causes do not bind. *Graver*: 103); *L. C.* 268.

S. v. BEACH (Statutes may prescribe what is *prima facie* evidence of guilt; due process of law; *S. v. Thomas*): *L. C.* 258.

S. v. BECK (1833), 1 *Hill (S. C.)*, 363, 3 *Crim. Def.* 289, 26 *Am. Dec.* 190, 191; *Ames, Cas. Torts*, 88; *cited*, 1 *Bish. C. L.* 260, *Cool. Torts*, 188. *Cited*, §§ 293, 294, 304, Gr. & Rud.

Beck stated: A thief was caught, and he believed that a chastisement would satisfy the law, but he was mistaken. However, he finally persuaded B. to flog him to satisfy the law. Afterward, he was indicted and punished for the theft. Then he had B. indicted for striking him at his own request and for his own benefit, as was supposed. *Held*, B. was not guilty. *Willey*, 64 *Vt.* 212, 15C *L. R. A.* 853, n.

Assault and battery; consent a defense. *Volenti non fit injuria*; *Stephens*; *Hegarty*; *Ames, C. Torts*, 80; *Goldmamer*, 98 *Ky.* 569, 56 *Am. St.* 378, n., 36 *L. R. A.* 715; *Bish. Torts*, 196, *Cool.* 187.

Consent of injured person as an element. *Volenti non fit injuria*. *Hegarty*. See *S. v. Moore*; *Hooker v. Miller*; *Bird v. Holbrook* (one cannot consent to destruction of life and limb, nor does he forfeit these in the commission of a mere trespass).

Assault and battery as a civil injury. *Stephens*, *Bigl. Lead. Cas. Torts*; *Cole v. Turner*, *id.*

S. v. Beck.—

Crimes; fights by agreement. Gutzman, 114 Wis. 589, 58 L. R. A. 744; Miller, 94 Wis. 123. *Sub* Hegarty, 1 Bish. C. L. 255-263, 3 Crim. Def. 287-407.

The injured person in the wrong or consenting. 1 Bish. C. L. 256-263; Moak, U. Torts, 279-294, 3 Crim. Def. 287-407. In the civil action the agreement to fight may be shown in mitigation. Grotton, 84 Me. 589, 30 Am. St. 413; cases; Barholt, 45 Ohio, 177, 4 Am. St. 535; Adams, 33 Ind. 531, 5 Am. Rep. 230. Nor will it make any difference that the plaintiff agreed to "clear defendant of the law." Stout v. Wren (1821), 1 Hawks (N. C.), 420, Blgl. L. C. Torts, 232, 1 Wh. C. L. 751, 7th ed.

Limitations of power to contract. §§ 14-18, Hughes, Conts.; Work v. S.: 242; Condonement and settlement, 12 Cyc. 161.

Instigation or consent to crime for the purpose of catching criminals, as a defense to a prosecution. Connor v. P. (1893), 18 Colo. 373, 25 L. R. A. 341-349, ext. n.; Goode v. U. S., 159 U. S. 663; Rosen v. U. S.; Andrews v. U. S., 162 U. S. 410; Love v. P. (1896), 160 U. S. 501, 32 L. R. A. 139; Robinson v. U. S. (1895), 34 Tex. Cr. Rep. 71, 53 Am. St. 701, n., 12 Am. Cr. Rep. 279-283.

If inducement and consent instigated and produced or materially contributed to the criminal act, then such consent would tend to excuse, and has been held to excuse. But otherwise where a plan is laid and carried out to entrap a real criminal. *See* ENTRAPMENT.

S. v. BOLDEN: L. C. 216.

S. v. BROWN (1905), 37 Wash. 97, 79 Pac. 635, 107 Am. St. 798-805. An examined and legally qualified dentist cannot be required to obtain a license to manage and conduct a dental office. Limitations of legislative authority to interfere with natural and inalienable rights. Schnaier v. Hotel Co., 182 N. Y. 83, 108 Am. St. 790; Millett v. P.; Barbier v. Connolly; Phelps v. Racey; *Juris præcepta*. S. *ex rel.* Henson.

S. v. BURT, 17 S. D. 7, 106 Am. St. 759-770, ext. n.; Moore v. S., 45 Tex. Cr. 234, 108 Am. St. 952.

S. v. BUTTE CITY WATER CO. (1896), 18 Mont. 199, 56 Am. St. 574, Sto. Pl. 854, 855, 855a. S. P., Humphreys (Denials upon information and belief).

S. v. CHITTY (1830), 1 Bailey (S. C.), 379. *Cited*, Bish. C. L., 1 Bish. Cr. Proc. 1285, 3 Encyc. Pl. & Pr. 264, 265.

Barratry. A justice commits barratry who habitually foments litigation, to be brought before him, although the cases are meritorious. Barratry, maintenance and champerty are repressed for public order and tranquillity. 1 Bish. C. L. 541, 2 *id.* 63-69, 3 Encyc. Pl. & Pr. 264, 265, 2 Bish. Cr. Proc. 98-103, 154-156. Champerty and maintenance. 2 Bish. C. L. 121-140; Thalhimer. *See* EXTORTION.

S. v. CONKLE: L. C. 109.

S. v. CONWELL: L. C. 174.

S. v. CROTEAU: L. C. 271.

S. v. DAVIS (1840), 1 Ired. Law (N. C.), 125, 35 Am. Dec. 735-737, n. *Cited*, 1 Bish. C. L. 548, 2 *id.* 23, 30, 31.

S. v. Davis stated: D. was leading his horse, and while having some words with another, said to a third person: "Hold my horse and I will whip the rascal." He advanced with extended arms, but was knocked down with a gun. *Held*, he was guilty of an assault.

S. v. Davis.—

Definition of an assault; what is. Cole v. Turner; Stephens. An assault is an intentional attempt by violence to do an injury to the person of another. Rushing near one as if to strike is an assault, and justifies a repelling stroke. Offer to strike is, if in close proximity to one who would naturally believe that a stroke was imminent and certain. *S. v. Davis*, followed in *S. v. Baker*.

S. EX REL. BARNARD (1898), 19 Wash. 8, 67 Am. St. 706-722, 43 L. R. A. 317. *Cited*, § 85, Gr. & Rud.

S. EX REL. COLEMAN v. KELLY (1905), 71 Kan. 811, 70 L. R. A. 450-463. *Cited*, § 268, Gr. & Rud.

Construction of statutes; intent of legislature; how gathered. *Contemporanea expositio*, etc. Courts may look to the history of the legislation as shown by the journal in order to arrive at the real object of the act. End. Stat. 29; Church v. U. S. Courts are not bound by mere forms; nor are they to be misled by mere pretences. § 51, Gr. & Rud. They are at liberty, indeed are under a solemn duty, to look at the substance of things whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. The authority to enact a law may be inquired after, and generally the jurisdictional facts showing it must attend. Statutes often provide that printed copies of constitutions, statutes, and ordinances shall be *prima facie* proof. Convenience requires this. *See* COPIES. Likewise the authority to enter a judgment or a tax must attend. The jurisdictional facts must affirmatively appear. They are never presumed in proving an estoppel or a title founded on official proceedings. Clem: 2c; Rice v. Travis; Hannah: 128. Foundations of a judgment may always be inquired into; they may ever be tested by what is a ground for general demurrer or motion in arrest, or other substantial omissions. Slacum. Statutes cannot appropriate public funds for private enterprises, nor compete in business against business concerns, e. g., the Standard Oil Company; Loan Ass'n.

S. EX REL. HENSON v. SHEPPARD (1907), 192 Mo. 487-517, stated, 64 Cent. Law Jour. 125. *Cited*, §§ 5, 80, Gr. & Rud.

A demurrer admits every allegation well pleaded. *See* ADMISSIONS.

Limitations upon Congress and the state legislature; distinctions. Congress must have express power from the constitution while the state legislatures have all power like the British Parliament except when limited by express words in the state constitution. Coffey v. County, 204 U. S. 659.

The British Parliament is limited by a prescriptive constitution consisting of the Grounds and Rudiments of law. And the court in the above cases found, cited and followed the same prescriptive constitution exactly as would have been done in England. Trist v. Child: 214; Church v. U. S.; P. v. Turner: 252; P. v. Town of Salem; Indianapolis R. v. Horst: 223; C. v. Hess: 215; *Verba intentione debent inservire. Lex non exacte definit*, etc.; South Carolina v. U. S.

Courts are bound by morals, necessity, reason, convenience and the public welfare. Salus populi suprema lex. To the prescriptive constitution written constitutions and statutes must yield. *In præsentia majoris cessat potentia minoris.* Oakley v. Aspinwall: 222.

An indicted clerk of a court, from the

S. Ex Rel. Henson.

nature and the necessity of the case, must retire, and surrender control of the records of the court until his case is disposed of. "Ye cannot serve God and Mammon," "Lead us not into temptation," "You must avoid the appearance of evil," and *Nemo debet esse iudex in propria sua causa*, are fundamental and basic rules that cannot be departed from in the due administration of the laws. Written laws that derogate from fundamental law will be disregarded. Indianapolis R. R. v. Horst: 223. Said the court:

"It does not follow that the clerk of a court, charged with the heavy crime of murder in the first degree and arraigned in his own court should be compelled to act as clerk at the trial of his own case, and ultimately sign, peradventure, his own death warrant. Such condition is abhorrent to right feeling, the fitness of things and the decencies of life, and ought not to be demanded nor tolerated by the law. Manifest scandals and misgivings would flow from such unseemliness and indecency. Not alone because it would be unnatural and unmerciful to compel a man to act as clerk where his own life or death was trembling in the scales of justice, but poor human nature may well be deemed inadequate to resistance of the temptations incident to such opportunity. Deep and keen is the significance of the Master's formula, 'Lead us not into temptation.' In this case the relator has the custody of his own indictment, his own recognizance, the evidence before the coroner and the committing magistrate, and hovers over all the process, entries and proceedings. It is a debt due to justice, *ex debito iustitie* that this should not be. If there were no precedent for a *locum tenens*, a clerk for that term, we would make one. But there is a precedent (*Ex Parte Lehman*, 60 Miss. 397), and that precedent will be followed. In that case the clerk was charged with forgery, etc."

In the teeth of statutes and constitutions, despite these, the written law, against the letter, the prescriptive constitution, is imported as a silent factor by interpretation. One of its dominating and ever-controlling canons is that "no man shall be judge of his own dispute." Dimes: 176; Oakley: 222.

"No one can act where his interest and his integrity come in conflict." *Idem agens et patiens esse non potest.* Keech v. Sanford; Michoud v. Girod. It is not to be supposed that the clerk could fairly and impartially discharge his various duties under such circumstances; "the spirit falleth, where the flesh qualleth." "What will not a man give for his life" is considered in the taking of bail in capital cases.

"The letter killeth but the spirit maketh the law." Great moral principles exist and are expressed in the maxims of antiquity—the condensed good sense of nations; some of these maxims are cited and approved in the principal case. Indeed they led the Court's reasoning. These great moral precepts are from antiquity and they are for eternity; they cannot be departed from where the law is reason and morals. Profoundly moral precepts reign, and they must be ever respected, constitution or no constitution, statute or no statute, precedent or no precedent. *Summa ratio est quæ pro religione facit* has ever been and ever must be the law. *Regula*

S. Ex Rel. Henson.

pro lege, si deficit lex. Lex non exacte; 67 Cent. L. J. 61.

The grounds and rudiments of law are the prescriptive constitution. They dictate and lead from chaos-shoals afar as a kindly light; from the impossible and the absurd which wreck the harmony and the philosophy of law and the uses and purposes of courts. Church v. U. S.; S. v. Brown.

The maxims are the datum posts of jurisprudence from of old and from on high. They are "a cloud by day and the pillar of fire by night." *In præsentia majoris cessat potentia minoris.* 64 Cent. Law Jour. 128-134.

The slightest interest is sufficient to disqualify. A question of power is not to be settled by the degree in which it is exercised. If it can be exercised at all then it may be exercised at the will of him into whose hands it is placed.

S. EX REL. HEWELL v. FURDY (1874), 36 Wis. 213. Candidate corrupting voters forfeits his claims to office. *Nullus commodum, etc.* Cited, § 158, Hughes' Proc.

S. v. GARDNER (1905), 96 Minn. 318, 2 L. R. A. (N. S.) 49, ext. n.

Self defence; "retreat to the wall"; meaning of; general discussion. C. v. Selfridge.

S. v. GATELL (1860), 30 Mo. 92. Stated: In an enclosure a horse was grazing. With intent to steal, G. entered and put a rope around its neck and started to lead the horse away. Held, this was sufficient. *Larceny*; taking and carrying away. C. v. Uprichard; C. v. Holder; R. v. Thurborn; S. v. Homes. See LARCENY: cases.

S. v. GIRKIN (1840), 1 Ired. L. 121: Cited, 2 Bish. C. L. 1001-1008, Bish. Stat. Crimes, 495-514.

S. v. Girkin stated: G., in combat with Watson, bit and tore off a part of his ear and thus disfigured him, for which G. was indicted, who insisted: 1st, that he did not intend to disfigure, and, 2d, that tearing off a part of the ear was insufficient. Held, acts indicate the intention (C. v. York) and that W. was disfigured.

Mayhem, or maim. Stephens, 2 Bish. Cr. Proc. 850a-859; S. v. Johnson (1898), 58 Ohio St. 417, 65 Am. St. 769-775, n.

S. v. HARPER (1856), 6 Ohio St. 607, 67 Am. Dec. 363-373, ext. n.; Brandt, Sur., Whart. Neg., Dill. Munic. Corp., Beach, Pub. Corp.

Public officers; liability on bonds. S. v. Copeland (1896), 96 Tenn. 296, 54 Am. St. 840, 31 L. R. A. 844, n.; Fairchild v. Hedges (1896), 14 Wash. 117, 13 L. R. A. 815, n.; S. v. Gramm (1897), 7 Wyo. 329, 40 L. R. A. 690, n.; Tillinghast v. Merrill (1896), 151 N. Y. 135, 56 Am. St. 612, n. Bonds; liability of sureties for torts of officers done *colore officii*. McLendon v. S. (1893), 92 Tenn. 520, 21 L. R. A. 738; S. for use of Cocking v. Wade (1898), 87 Md. 529, 40 L. R. A. 628.

Officers; are insurers of public funds. Northern Pac., 86 Minn. 188, 91 Am. St. 336, n. They are not allowed to speculate with them. Keech.

S. v. HAWKINS (1882), 81 Ind. 480. Cited, § 125, Gr. & Rud.

S. v. HILDBRETH (1849), 9 Ired. Law (N. C.), 440, 51 Am. Dec. 369-373, n.;

S. v. Hildreth.—

cited, 1 Bish. C. L. 217, 720, 2 *id.* 744; 2 Bish. Cr. Proc. 607; P. v. Woodward (1873), 45 Cal. 293, 13 Am. Rep. 176, 177, n. *Accessories*, who are. *Actus non facit*, etc.; Breeze v. S. *Accomplices*; credibility of. U. S. v. Gooding; 202. State's evidence; contracts for, enforceable. *Nemo tenetur*, etc.

S. v. HOLDEN (1896), 14 Utah, 96, 37 L. R. A. 108; cases, 169 U. S. 368 (Holden v. Hardy); S. P., Slaughter House Cases. See *POLICE POWER*; *CONSTITUTIONAL LAW*; *MILLET* v. P.

S. v. HOMES (1852), 17 Mo. 379, 57 Am. Dec. 269-286, ext. n., 3 Crim. Def. 467; cited, 1 Bish. C. L. 297, 2 *id.* 758, 851. § 294, Gr. & Rud.

Larceny. Taking property under fair color or claim of title is not larceny, although taker is mistaken. *Phelps* v. P., 55 Ill. 334; C. v. Stebbins, 8 Gray, 497; *Billard* v. S.; *Cansey* v. S., 79 Ga. 564, 11 Am. St. 447; R. v. Twose.

Taking must be with felonious intent. See R. v. Thurborn; cases; note 57 Am. Dec. 273; *LARCENY*; *Actus non facit reum*, etc.; R. v. Charlewood, *sub* R. v. Ashwell; S. v. Kallaher (1898), 70 Conn. 398, 66 Am. St. 116, n. And to deprive the owner permanently of his property. Taking it for temporary use is not. Note, 57 Am. Dec. 275. Taking a horse to use it and then abandon it is not. Note, 57 Am. Dec. 275; *Dove* v. S. (1881), 37 Ark. 261; R. v. Phillips, 2 East, P. C. 662; P. v. York, 5 Harr. 493.

Larceny distinguished from embezzlement; false pretenses and breach of trust, on the line of trespass. 8 Crim. Law Mag. 131-147.

Larceny, generally. R. v. Thurborn; 2 Bish. C. L. 757-904, 2 Bish. Crim. Proc. 696-780.

S. v. LINKHAW (1873), 69 N. C. 214, 12 Am. Rep. 645, 4 Crim. Def. 445; 8 Rul. Cas. 47; cited, 2 Bish. C. L. 310, 3 Gr. Ev. 184.

S. v. Linkhaw stated: L. was a sincere and devout member of the M. E. church, and determined to sing with the congregation, although he had a peculiar drawl or hanging on to the notes, which was ludicrous but for the serious effect. It simply broke up the leaders; they would close up their hymn books and refuse to proceed, or would specially request L. to keep still. Finally he was prosecuted. At the trial a witness gave an imitation, and the bench, bar, jury, spectators—the whole court—were long convulsed with irresistible laughter. A jury convicted, but on appeal this was set aside, as his intentions were *bona fide*. *Actus non facit reum*, etc.

Disturbing religious worship; what constitutes. Act and intent must concur to constitute crime. *Actus non facit reum*.

Evidence of temperament, disposition and condition of a defendant is inadmissible, unless insanity is pleaded. *Jacobs* v. C. (1888), 121 Pa. 586, 6 Am. St. 802.

S. v. MARLER: L.C. 188. Contract law; insanity in. *Molton*: 413. Presumption of continuance of insanity. *Ford* v. S. (1896), 73 Miss. 734, 35 L. R. A. 117-124, ext. n.

S. v. MARSH (1903), 134 N. C. 184, 67 L. R. A. 179-195, ext. n. Cited, §§ 166-168, Gr. & Rud.

S. v. McKEE (1900), 73 Conn. 18, 46 Atl. 409, 84 Am. St. 124, n. § 313, Gr. & Rud.

S. v. MIKNER (1876), 45 Iowa, 248, 24 Am. Rep. 769-773, 50 Iowa, 145, 32 Am. Rep. 128, 5 Crim. Def. 160, n.: cited, 1 Bish. C. L. 886.

S. v. Mizner stated: M., a school teacher, corporally punished a pupil, but not immoderately. *Held*, justified. Assault and battery; force must be unlawful. *Stephens* v. *Myers*; *Cole* v. *Turner*.

S. v. MOORE: L.C. 222a.

S. v. NEBRASKA (State of), DISTILLING CO. (1890), 29 Neb. 700, 46 N. W. 155, 1 Am. R. R. & Corp. Rep. 504-699, ext. n., 74 Am. St. 246; *Distilling Co. v. P.*, 156 Ill. 448-492, 47 Am. St. 200-221; cases; P. v. *Chicago Co.* (1889), 130 Ill. 268, 8 L. R. A. 497, n., 17 Am. St. 319-341; *stated*, 48 Am. St. 331, 1 Am. R. R. & Corp. Rep. 552, 74 Am. St. 238; P. v. *North River Co.* (1890), 121 N. Y. 582, 9 L. R. A. 33-45, ext. n., 18 Am. St. 843-873, 1 Am. R. R. & Corp. Rep. 587, 1 Beach, Eq. 212; U. S. v. *Trans-Missouri*, 166 U. S. 290; cases. § 158, *Hughes*, Proc.

Trusts; pools; combines. *Harding*, *sub* *Mitchel*: 272.

Corporations can only exist for lawful purpose; trusts, monopolies and trade combines. *Cook* on Trade Combinations; *Mitchel*: 272. **Forestalling; engrossing; regrating.** 1 Bish. C. L. 514-529, 2 Benj. Sales, 799. **Engrossing.** 2 Bish. Cr. Proc. 348-350. **Forestalling.** 2 Bish. Crim. Proc. 396, 397.

S. v. ROANE (1828), 2 Dev. Law (N. C.), 58; cited, *Cool*, Torts, 202, 1 Bish. C. L. 305, 849, 2 *id.* 647, 657, 658, 681, 692, 3 Gr. Ev. 115, 1 Bish. Crim. Proc. 168.

Homicide; justification; resisting arrest. Necessitas inducit (stating S. v. *Roane*); *Noles* v. S.; *Stephens*; U. S. v. *Holmes*; 3 Gr. Ev. 123.

S. v. SEUPE (1864), 16 Iowa, 36, 85 Am. Dec. 485-501, ext. n. **Perjury;** its elements. See *PERJURY*. The issue important in. May be relating to *coram non judice* proceedings. S. v. *Rowell* (1899), 72 Vt. 28, 47 Atl. 111, 82 Am. St. 918. *Contra:* *Morford* v. *Ty.* (1901), 10 Okla. 741, 54 L. R. A. 513-521, ext. n.

S. v. SMITH (1847), 2 Strobb. (S. C.) 77.

Stated: S. fired a pistol while drunk and disorderly, to make Carter's horse throw him. The ball killed an infant. *Held*, S. was guilty of murder.

Intent. Intent is presumed from act. *Res ipsa loquitur*; *Actus non facit reum*; C. v. *York*; *Loeffner* v. S. One is presumed to intend the natural, direct and probable consequences of his act. *Squib* Case. *Spies* v. P.; R. v. *Serne*.

S. v. SUMNER (1844), 2 Speer's Law (S. C.), 599, 42 Am. Dec. 387, 388.

Sumner stated: S. was a participant in a prize-fight about to take place in violation of law. He and others were gathered together to aid and abet it. *Held*, guilty of a rout.

Rout. *Sub* *Stephens* v. *Myers*. *Actus non facit*. P. v. *Robey*.

S. v. THOMAS: L.C. 257.

S. v. THURSTIN: L.C. 23.

S. v. TOWSELEY: L.C. 225a.

S. v. WEED (1850), 21 N. H. 262, 1 Lead. Crim. Cas. 202, 53 Am. Dec. 188.

S. v. Weed.—

Regular process protects an officer. *Savacool*: 164; *Grace*.

S. v. WEST (1903), 118 Wis. 469, 95 N. W. 521, 99 Am. St. 1002.

Witnesses; husband and wife. The rule that neither husband nor wife can testify for or against the other is confined to cases where the testimony, if given, would be by one directly for or against the other, such other being a party to the litigation.

The husband of an adulteress may testify of her relations with another man where he is incriminated with attentions by a third person. *S. v. West*. See *R. v. Inhabitants of All Saints*.

S. v. WOODROW, 58 W. Va. 527, 2 L. R. A. (N. S.) 862-872, ext. n., 112 Am. St. 1001. *Sexton*.

STATUS OF PARTIES: Contracts in relation to. 1 Page, *Conts.* 423-431; *MARRIAGE*; *MARRIAGE BROKAGE*.

Duties of husband and wife; custody of children; separation. *ALIMONY*; *WILLS*; *HUSBAND AND WIFE*; *INFANTS*.

STATUTA SUO CLUDUNTUR TERRITORIO, nec ultra territorium disponent: Statutes are confined to their own territory, and have no extra-territorial effect. 4 Allen, 324; *Story*, *Conf. L.* 24; *Ableman v. Booth*.

STATUTE: An act of the legislature. The written will of the legislature solemnly expressed according to the forms necessary to constitute it the law of the state. It is the *lex scripta* (written law) in contradistinction to the *lex non scripta* (unwritten law, or the common law), defined by commentators. *Suth. Stat.* 7. See *COMMON LAW*.

Many statutes merely affirm or declare the common law. These are called affirmative statutes, *e. g.*, codes reaffirm the common law by the provisions that the complaint shall contain the statement of a cause of action and that the filing of an answer will not waive that requirement. See *CODE*; *ABATEMENT*; *THEORY OF THE CASE*. § 119, *Gr. & Rud.* To this the common law rule, that the general demurrer searches the whole record (essential pleadings) and attaches to the first fault, applies. *Slacum*. Also the remedy by motion in arrest of judgment or by collateral attack is contemplated by the code provision. These illustrations show how statutes and the common law unite or co-operate for protection in the scheme of government. As it is with the code, so it is with other statutes. The Statute of Frauds and Perjuries reaffirms many principles of the common law; some of these are resolutions in *Twyne's Case*.

Statutes in derogation of the common law are strictly construed. 1 Kent, 464; *Kidd* (1897), 120 Ala. 79, 74 Am. St. 17; *Cool. Const. Lim.* 75, n.; 1 Grant, *Cases*, 57; *C. v. Hess*: 215; *Lonsdorf*; *Kansas v. Colorado* (1907), 206 U. S. 95. §§ 13, 20, *Hughes' Proc.*

A statute providing that the certified copy of a deed may be used as evidence does not exclude the original nor a sworn copy. 1 Whart. *Ev.* 94; 1 *Gr.* 485, 498, 507, 508; *Jackson v. Bradt* (1804), 2 *Caines*, 169.

Courts reluctantly extirpate principles of the common law by new and innovating statutes. An illustration of this is found in the equitable exceptions to the Statute of Frauds. *Lester*: 341; *PRESCRIPTIVE*

Statute.—

CONSTITUTION; *CODES*. Consequently the rule is that:

Statutes are construed to conserve dominating policies, the scheme of government and the integrity of the law. *End. Stat.* 182; *Bro. Max.* 588, 587; *Bates*: 225; *Osgood*; *Union Trust Co.*; *Quinn v. P. Concordare leges legibus est optimus interpretandi modus*; *Lex non exacte*, etc.; *Verba intentione*, etc.; *THEORY*. § 13, *Hughes' Proc.*

The foregoing rationale is deemed very important, and should be well considered. It involves extended discussions of *negative* and *affirmative*, of *mandatory* and *directory* statutes. §§ 83-123, *Gr. & Rud.* Also there is involved the limitations of power of legislatures to interfere with the essential means of the judiciary. See *APPELLATE PROCEDURE*; *COLLATERAL ATTACK*; *Res adjudicata*; *DUE PROCESS OF LAW*; *CERTAINTY*; *CONSTITUTIONAL LAW*; *CONSTRUCTION*; *PROCEDURE*; *MAXIMS*; *RULES OF COURT*; *POLICE POWER*; *Ut res magis*, etc.; *Verba fortius*, etc.; *VARIANCE*; *WAIVER*; *Leading Cases*, 218, 232. §§ 23, 28, 42, 109, 119, 199, 239, *Hughes' Proc.*

As observed of constitutions, so it is with statutes; there is the strict or literal and the liberal constructionist. The maxim of the former is *Ita lex scripta est*: 1 Kent, 448; *Expressio unius*, etc.; of the latter, *Expressio eorum*; *Quando lex aliquid*, etc.; *Lex non exacte*, etc.

Penal statutes are strictly construed. *Ellis v. U. S.*; *Creppe*: 113; *U. S. v. Wiltberger*; stated, 177 U. S. 310; *Bro. Max.* 570; *Bitty v. U. S.*, 208 U. S. 1217. See *Nelson v. S.* (1901), 111 Wis. 394, 87 Am. St. 881 (absurdities are excluded). Taxation or revenue laws are viewed as penal statutes and are strictly or literally construed. See *TAXATION*; *Suth. Stat.* 361-363, 10 Am. Cr. Rep. 68.

Unconstitutional statutes are void. *Kelly*: 285; 1 Kent, 448; *Bouv. Dic.* (Statute); *S. ex rel. Coleman*.

The judiciary have power to declare statutes void. 1 Kent, 448-454; *Marbury*: 142.

It is the duty of all courts and judges, and of every grade, both federal and state, to uphold the supreme law of the land. *Lane v. Dorman*. See *CONSTITUTIONAL LAW*; *Bouv. Dic.*; *SUPREME LAW OF THE LAND*.

Statutes are presumed constitutional until the contrary is shown. *Austin v. S.* (1898), 101 Tenn. 563, 70 Am. St. 703, n. See *Austin v. Tennessee*; *Cool. Const. Lim.* 182; *Suth. Stat.* 330-332; *Bouv. Dic.* See *CONSTITUTIONAL LAW*. The burden of showing is on him who affirms. *Actore non probante reus absolvitur*; *Semper præsuntur pro negante*; 102 Am. St. 34-67.

Authentication of statutes. See *LEGISLATIVE JOURNALS*; *Suth. Stat.* 27-51 (common-law record).

Title to statutes. *Nigrum*, etc.; *Bobel v. P.*: 250; *Boorum*, 66 N. J. Law, 197, 88 Am. St. 469, n.; 1 Kent, 460; *Suth. Stat.* 76-103 (states requiring); *Dolus versatur in generalibus*; *Suth. Stat.* 90.

Remedial statutes are liberally construed. *Heydon's Case*; *Bro. Max.* 570; *Suth. Stat.* 433-434; *e. g.*, if a right is given by statute, a remedy annexes itself by implication. *Bro. Max.* 195; *Ubi jus ibi remedium*. See *MANDATORY*.

Strict construction; restricted right under statute giving right of action for defective highways. No recovery can be had under a statute giving a right of action for a

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penalty in case of injuries caused by a defective highway, where the injury is caused by such defects combined with the negligence of a third person. *Bartram*, 71 Conn. 686, 46 L. R. A. 144; 98 Wis. 624.

A married infant is not an heir to sue for death from wrongful act. *Actio personalis*, etc. Rights, privileges and immunities. *Blake*. Remedial and penal statutes; distinctions. *Aylsworth v. Curtis* (1896), 10 R. I. 517, 61 Am. St. 785, n. See *Suth. Stat.*

Instances of liberal construction are elsewhere cited. See *Verba intentione debent inservire*; *Harper*: 218; *Union Trust Co. v. S. v. Bolden*: 216; *Ad ea quæ frequentius*, etc.; *Expressio eorum*, etc. 1 Bl. Com. 61, 431 (equitable construction).

The express word or words of a constitution do not limit statutes. The old argument is often heard, often repeated, never assented to, that when a question of the power of Congress arises, the advocate of the power must be able to place his finger on words which expressly grant it. *South Carolina v. U. S.*; *Church*; *CONSTITUTIONAL LAW*. See *Brown v. Thorpe*; *Rison*: 253; *Blair*: 254; *CONSTITUTIONAL LAW*.

Of strict construction. See *Expressio unius*, etc.; *Lex non exacte*; *Ita lex scripta est*; *Cruikshank*: 232; *James*: 233.

Void for uncertainty. *James*: 233; *P. v. Burns*, 138 Cal. 159, 60 L. R. A. 270, n. See *Casus omissus*.

May be valid in part and void in part. *Suth. Stat.* 169-178; *Sprague*: 236; *Mallan*: 373; *Austin*; *Blake*; *Fisher v. McGirr*; *Austin v. S.*; *Noel v. P.* (1900), 187 Ill. 587, 79 Am. Dec. 238, n.; *Bouv. Dic.* (St.).

Statutes can not be evaded by shifts and contrivances. See *Verba intentione*, etc. What can not be done directly can not be done indirectly. *Ilisley*: 169; *Webb v. Ins. Co.*; *Bouv. Dic.* (Statute). § 151, Gr. & Rud.

Intention is sought and leads; absurdities are excluded; reason, consistency and intelligence are interpreted; the scheme of government and its means are conserved. *Verba intentione debent inservire*; *Church*; *U. S. v. Kirby*; *Riggs*; *Quinn v. P.*; *End. Stat.* 182; *Nelson v. S.*, *supra*; *Dority*; *Lester*; *Ad ea quæ frequentius*, etc.; *Verba intentione*; 25 L. R. A. 564.

A statute to prohibit but ostensibly to regulate is nevertheless valid. *Pabst*. § 151, Gr. & Rud. See *Graham v. Folsom*.

Necessity influences construction. Notice to quit may be served upon the wife and satisfy a statute providing that it shall be served on the husband. *Cranston*, 27 R. I. 445, 114 Am. St. 56; *PRESCRIPTIVE CONSTITUTION*; *Lex non exacte*.

Can not derogate from the public welfare. *End. St.* 182. Nor natural right. *Dash*: 237a; *Dimes*: 176; *Indianapolis*: 223; *O'Connell*: 224; *Oakley*: 222; *Dority*; *Blake*.

Natural rights can not be abrogated by. *Pot. Dwar.* 76; *Dash*; *Dimes*; *Oakley*; *P. v. Turner*: 252; *Rubstrat.* sub *POLICE POWER*. See *SUPREME LAW OF THE LAND*; *CONSTITUTIONAL LAW*; *PRESCRIPTIVE CONSTITUTION*; *In præsentia majoris cessat potentia minoris*.

Curative statutes may be. *Steger*.

Are controlled by reason, morality and common right. 1 Kent, 448; *Dash*; *Oakley*; *Trist*: 214; *Lex est dictamen rationis*; *Riggs*; *Church*; *contra*, *Ransom*, sub *Riggs*.

Arbitrary power and monarchial tendencies to be excluded. *Noel v. P.*, *supra*; *Lex non exacte*.

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Ordinances of the Supreme Court of Judicature in England regulating procedure are analogous to statutes. Connecticut has borrowed the same act. See, also, rules of court, and municipal ordinances.

Borrowed statute is construed as it is in its home. *S. v. Moore*: 222a; *Coad v. Cowhich* (1901), 9 Wyo. 316, 87 Am. St. 953, n.; *Copper Co. v. Ariz. Board* (1907), 206 U. S. 474; *Fay's Estate*.

When statutes take effect; computation of time. 1 Kent, 444; *Matthews v. Zane*, 7 Wheat. 164; *Warren v. Slade*; *Suth. Stat.* 104-107; *Bouv. Dic.* (St.).

Repeal of statutes; repeal by implication not favored. *U. S. v. Lee*, 185 U. S. 213; *Suth. Stat.* 136-139. See *REPEAL*; *Bouv. Dic.* (St.). A general statute will not repeal a special. *Generalia specialibus non derogant*.

In pari materia. Statutes are construed together and are made to harmonize, if possible. 185 U. S. 213; *Suth. Stat.* 283-288; *Hyde v. Johnson*.

Where fundamental principles of the constitution are of equal dignity neither must be so enforced as to nullify or impair the other. *Concordare*; *Dick v. U. S.*, 208 U. S. 340. In pari materia; *Ignorantia legis*; *In præsentia*.

Treaties and statutes are construed together. 185 U. S. 213. Common law also. *C. v. Hess*: 215; *Concordare leges legibus*, etc.

Usage or custom can not change or oppose. *Noble*: 251. See *DAYS OF GRACE*; *PRACTICAL CONSTRUCTION*; *Contemporanea*.

State: Sovereignty not bound unless it is named to be bound. *Roy n'est*; *Barron*: 241.

Generally: *Suth. Stat.*; *End. Stat.*; *Sedgk. Stat.*; *Pot. Dwarries*; *Smith, Stat.*; 2 *Bouv. Dic.* 1031-1036; *And. Dic.* 969-972; 1 Bl. Com. 59-61; 1 Kent, 496-471; *McClain*, C. L. 86-110. See maxims relating to; also L.C. 213-250; *CONSTITUTIONAL LAW*; *CONSTRUCTION*.

Pleading and proof of statutes. Statutes are presumed regularly passed unless the contrary is shown. *Suth. Stat.* 27, 53. Their force and validity depend upon their foundations, namely, the original or high record. *Suth. Stat.* 27. The validity of this may be put in issue by a proper plea, and exactly as the record of a judgment may be put in issue. *Suth. Stat.* 27.

Courts take judicial notice of general laws, but not of defective records, affecting statutes, unless they are pleaded or produced and shown. *Suth. Stat.* 53.

Matter of law need not be pleaded. See *JUDICIAL NOTICE*.

Provisos and exceptions in statutes must sometimes be pleaded. *C. v. Hart*: 227.

Private and special statutes must generally be pleaded. Codes often provide this may be done by reference to the title and the date of the act; this avoids prolixity. Private statutes are viewed as corporate by-laws in relation to pleading and proof. See *King v. R. R.*: 205.

The constitutionality of a state statute under the state constitution is a state question. *Smith v. Jennings* (1907), 206 U. S. 277; cases; *Pabst*; *Hulbert v. Chicago*.

Statutory facts, when rights are dependent upon them, must be specifically pleaded. *Williams*: 7; *Russell*: 87. See *TAXATION*.

Prohibition of contract; legislative power. *Millett*; 3 *Page*, *Conts.* 1778-1796.

STATUTE OF ANN; SEVERAL PLEAS: See *Bell v. Brown*; *And. Steph.* Pl. 317-323, also pp. 438-440, *id.*, which is as

Statute of Ann.—

confusing as *Bell v. Brown* and the Auburn Case. Demurrer and answer will not lie to same count. Auburn Case; *Alleghans*. The statute quoted and discussed. 48 L. R. A. 178. Seattle Natl. Bk.

STATUTE OF FRAUDS: See L.C. 334-341: cases. Also FRAUDS AND PERJURIES. Writing required by cannot be aided orally. Goss: 55. See FRAUDS AND PERJURIES; Wain v. Walters: 335: cases. Equitable exceptions to. Lester: 341. Fourth section of. See §§ 82, 83, Hughes' Conts. Seventeenth section. See § 83a, Hughes' Conts.

STATUTE OF JEOPAILS: See AMENDMENTS; JEOPAIL. Original bill, if copied in the record, is cured by. Wilson Case (1620). Hob. 130. See Munday: 79; Rush-ton: 5.

STATUTES AT LARGE: 2 Bouv. Dic. 1036.

STATUTORY RECORD: See BILL OF EX-CEPTIONS; MANDATORY RECORD. Defined. §§ 7, 9, 13, Hughes' Proc.; §§ 53, 63, 101, 224, Gr. & Rud.

Is strictly judged (construed). Hake. § 13, Hughes' Proc.

Demurrers and objections that proceed-ings are *coram non iudice* are never di-rected at. See DEMURRER; *Coram iudice*.

Not aided by evidence *aliunde*; affida-vits cannot add to; the record rule ap-plies. Met. R. R., 195 U. S. 322.

Must be certain and sufficient. § 53 (Con-venience). Gr. & Rud.; Jones, 101 Mo. 447, 115 Am. St. 328; *Verba fortius*.

Will not support res adjudicata. §§ 175, 224, 235, Gr. & Rud.; Draper. Nor aid the mandatory record. § 238, Gr. & Rud. Depends on the assignment of errors. § 53 (Convenience). Gr. & Rud. See ASSIGN-MENT; *De non*; Draper.

STATUTORY RIGHTS: How pleaded. Russell: 87; Williams: 7; Suth. Stat. 392, 397-398. See TAXATION.

Are strictly construed. A statute giving a right of action to heirs for killing a per-son is strictly construed. This gives a "cause of action" to heirs only. Webster, 137 Cal. 399, 92 Am. St. 181. *Actio per-sonalis*, etc.

Remedial statutes are not always liber-ally construed. Lonstorf. See *Terre Haute* (Pa.) R. R. v. Ind.

STATUTUM AFFIRMATIVUM NON derogat communī legi: An affirmative statute does not take from the common law.

STATUTUM SPECIALE STATUTO speciali non derogat: One special statute does not take away from another special statute. Jenk. Cent. 199. *Generalia spe-cialibus non derogant*.

STAT OF PROCEEDINGS: A court may grant. Greer Case, *sub Quia timet*. To present new matter. Sto. Eq. Pl. 903. § 140, Hughes' Proc.

STEEG v. TRAVELING MEN'S Building Association (1904), 208 Ill. 236, 70 N. E. 236, 100 Am. St. 225, n.

Curative statutes may be enacted to cure informalities where they do not interfere with vested rights. P. v. Seymour: 256. See TAXATION: cases.

STENOGRAPHER: 2 Bouv. Dic. 1037. Stenographic notes as evidence. Padgett, 159 Mo. 143, 81 Am. St. 347-368, n.; 3 Wigm. 1669; 1 Ell. Ev. 495-517.

STEPHENS v. MYERS (1830), 4 Car. & P. 349 (19 E. C. L. R.), Bigl. L. C. Torts, 217-234, ext. n.; Chase, Cas. 71. Ames, Cas. 3; Mews' E. C. L.: cited, 1 Bish. C. L. 548, 2 id. 31, Bish. Stat. Crimes, 495-514, 2 Add. Torts, 787; S. v. Davis; 3 Gr. Ev. 59, 2 id. 82.

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Cited, §§ 206, 213, Gr. & Rud.

Assault. An assault is committed when there is an attempt to commit a battery. Ste-phens. See *Cole v. Turner* as to an as-sault (1705), 6 Mod. 149, Holt, 108, Bigl. L. C. Torts, 218-234, ext. n. (To touch another in anger, though in the slightest degree, or under pretense of passing by, is in law a battery); S. v. Baker; Smith v. S.; S. v. Beck; C. v. Eyre; S. v. Roane; S. v. Davis; *Bird v. Jones* (1845), 7 Q. B. 742-755 (53 E. C. L. R.), 68 R. R. 564, Ames, Cas. Torts, 36 (what consti-tutes an assault), Cole.

School fellows: "rushing"; liability for. Markley, 95 Mich. 236, 35 Am. St. 558, n., 20 L. R. A. 55, n. (intent to injure im-materal); Mercer, 117 Ind. 450, 10 Am. St. 76, n., 3 L. R. A. 321 (gross negli-gence supplies intent; *R. v. Longbottom*; *R. v. Lowe*; also a wanton disregard of the safety of others. Intent is inferred from the act. C. v. York; Vosburg, 80 Wis. 523, 14 L. R. A. 226, n. (intent as an element).

Words never constitute an assault. Ireland v. Elliot (1857) 5 Ia. 478, 63 Am. Dec. 715-717, n.; Cool. Torts, 29, 2 Bish. C. L. 25, 704, 1 Wat. Tres. 3; Allen v. U. S. (1896), 164 U. S. 492; 3 Gr. Ev. 122-127, *sub U. S. v. Holmes*, n.; C. v. Eyre. But may an affray. S. v. Fanning (1886), 94 N. C. 940, 55 Am. Rep. 653. See 2 Whart. C. L. 2495, 2496, *sub R. v. Fisher*; Goldsmith v. Joy (1889), 61 Vt. 488, 4 L. R. A. 500, 15 Am. St. 923. See PROVO-CATION.

Words are not fighting. If an affray is caused by them, the one using them must be ready and willing to fight. 2 Bish. C. L. 1.

Husband and wife. His right to chastise wife is generally denied. C. v. McAfee (1871), 108 Mass. 458, 11 Am. Rep. 383; Cool. Torts, 222, 223, 1 Wat. Ac. & Def. 569, 1 Bish. C. L. 891, 897, 1 Bl. Com. 444, 21 Cyc. 1150.

The wife was formerly treated as a chattel; was called in law a "wench," and was subject to personal chastisement by her lord. Notes, 2 Green. Crim. Rep. 283, 289; and this law is recognized in S. v. Rhodes (1868), Phillips' Law (N. C.), 453, 98 Am. Dec. 78-82, n.; S. v. Black (1864), 1 Winston (N. C.), 266, 86 Am. Dec. 436, n.

Provocation; "cooling time." U. S. v. Holmes.

Consecutive and systematic insults, though trifling, may constitute. *De min-imis non curat lex*; *Res inter alios*, etc.

Offenses against the person. 5 Crim. Def. 723-1199, U. S. v. Holmes.

False imprisonment; delay in taking bond. Beville v. S. (1884), 16 Tex. App. 70, 5 Crim. Def. 563. Or failing to take arrested person before a judicial officer. Burk v. Howley (1897), 179 Pa. 539, 57 Am. St. 607, n.; Brock v. Stimson (1871), 108 Mass. 520, 11 Am. Rep. 390.

Duelling. 1 Encyc. P. & Fr. 232-234, n., 2 Bish. C. L. 2, 311-317, 2 Bish. Cr. Proc. 302-311.

Pleading, practice and evidence. 1 Wat. Tres. 211-292; 2 Add. Torts, 820-849. A battery implies injury. No more need be shown to make a *prima facie* case. 1 Gr. Ev. 30, n. *Res ipsa loquitur*.

Justification matter must be pleaded. Wat-son, *sub J'Anson*: 91; Price v. Seeley; *Savacool*: 164. Lambert, 162 Mass. 34, 44 Am. St. 326, 2 Gr. Ev. 85.

Res gestæ facts may be shown in mitigation without pleading new matter. 1 Suth. Dam. 159, citing Watson.

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Exemplary damages may be awarded. Moak, Torts, 226; cases; Merest.

Teacher and pupil. Right of teacher moderately to chastise pupils. 2 Best, Ev. 435, n. Right to, is generally recognized. S. v. Mizner; Patterson, 78 Me. 509, 57 Am. Rep. 818; Moak, Torts, 219, 2 Kent, 205, n.; Cool. Const. Lim. 841, n.; Bish. Torts, 592-597; cases, 1 Bish. C. L. 886, 1 Wat. Tres. 199; R. v. Hopley; Boyd v. S. (1889), 88 Ala. 169, 16 Am. St. 31, n.; Vanvactor v. S. (1887), 113 Ind. 276, 3 Am. St. 645; McCain, C. L. 242, 348; Drum, 135 N. C. 204, 65 L. R. A. 890-903, ext. n. (for personal injury to child).

Expulsion of child for parent's misconduct. Board, etc. Co., 101 Ga. 422, 65 Am. St. 312-339, ext. n. *Teacher's authority over pupils.* Lander, 32 Vt. 114, 76 Am. Dec. 156, n.; Guernsey, 32 Vt. 224, 76 Am. Dec. 171; Anderson v. S. (1859), 3 Head, 455, 75 Am. Dec. 774; S. v. Mizner. *May make rule forbidding pupils quarreling on road.* Deskins v. Gose (1885), 85 Mo. 485, 65 Am. Rep. 387. *Teachers right to establish and enforce rules.* 24 Am. Law Reg. (N. S.) 662; S. v. Vanderbilt (1888), 116 Ind. 11, 9 Am. St. 820; Holman v. Trustees, 77 Mich. 605, 6 L. R. A. 534, n. (rules and regulations for conduct and management of pupils); Hill v. Boston.

Veneral diseases. Infecting one with, who consents to intercourse, is non-actionable. R. v. Clarence; Hegarty v. Shine; Mews' E. C. L. 227. *Administration of drugs.* S. v. Monroe (1897), 121 N. C. 677, 61 Am. St. 886, n.

Affrays. See WORDS; SELF-DEFENSE; 2 Bish. C. L. 1-7; 2 Add. Torts, 787-849; 1 Encyc. Pl. & Pr. 382-383; 2 Bish. Cr. Proc. 16-30.

Riots. Beatty v. Gilbanks (1882), 9 Q. B. D. 368, 15 Cox, C. C. 138, 1 Bish. C. L. 206, 2 id. 1143-1155, 1258a, 3 Gr. Ev. 216-222, 2 Bish. C. Proc. 992-1000, 7 Encyc. Pl. & Pr. 38-43.

Assaults and wounding. Aiming at one and striking another. R. v. Serne; R. v. Latimer. See SELF-DEFENSE. Assaults; grievous bodily harm. Sub R. v. Latimer. Pointing an unloaded pistol at one is not an assault. Klien v. S. (1894), 9 Ind. Ap. 365, 53 Am. St. 354.

Assault and battery. Generally: 1 Wat. Tres. 142-292, 2 Bish. Crim. Proc. 54-70a, 5 Crim. Def. 792-862, 2 Bish. C. L. 22-72, Cool. Torts, 184-195, Bish. 186-204; Moak, 204-228, Clark, Crim. Cas. 289-302, 2 Gr. Ev. 82-100, 3 id. 58-65, 2 Encyc. Pl. & Pr. 835-854. *Arrest for.* Allen v. Wright. *False imprisonment.* Allen: 167. *Peace bonds may be required.* 2 Kent, 15.

Breach of the peace. 3 Encyc. Pl. & Pr. 678-682. "Breach of the peace" defined. P. v. Johnson (1891), 88 Mich. 175, 13 L. R. A. 163, n. *Disorderly conduct.* 7 Encyc. Pl. & Pr. 1-6. Great provocation may be returned with more force than is necessary in strict defense; chastisement may be given; excess is not weighed in gold scales. P. v. Pearl (1889), 76 Mich. 207, 4 L. R. A. 709, 15 Am. St. 304. See PROVOCATION; Volenti non fit injuria; Necessitas inducit.

STET (Processus): Let it stand, or be stayed. And. Dic. 973.

STETSON v. KEMPTON: L.C. 163.

STEVISON v. EARNEST (1875), 80 Ill. 513. Cited, § 125, Gr. & Rud.

Illegally obtaining evidence does not render it incompetent. A statute provided an exemplification of a record should be admissible. A party obtained the original files and offered them in evidence. Held, these were admissible. If the copy was

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admissible *a fortiori* the original was. *Cessante ratione legis*, etc.; *Lex neminem cogit ad vana*, etc.; Adams v. N. Y. Instruments of evidence admissible although wrongly obtained. Adams v. New York. *Nullus commodum.* It would be absurd to reject the original and require a copy. Absurd, vain and fruitless things are never required. In proving title upon a judgment, its foundation—the mandatory record—must be produced. Clem: 2c.

STEWART v. CASE (1893), 53 Minn. 62, 39 Am. St. 575, n. (liability of judicial and quasi-judicial officers). Lange: 159; Stewart v. Cooley; Spaulding v. Villas.

STEWART v. COOLEY (1877), 23 Minn. 347, 23 Am. Rep. 690, Cool. Torts, 412, 482, Mech. Ag. 584.

Judicial officers liable for malicious and corrupt acts done in pursuance of their official duty. See Lange; Stewart v. C.; Stetson.

STILK v. MYRICK: L.C. 313.

STIPULATED DAMAGES: Kemble: 391.

STIPULATIONS: Attorney, stipulation; power to bind client by. An attorney may waive his client's right of appeal by agreement of record. Pike v. Emerson (1831), 5 N. H. 393, 22 Am. Dec. 468; 2 Gr. Ev. 141, 2 Wh. 1184. § 53, CONVENIENCE, Gr. & Rud.

Stipulations of counsel must be in writing (notes to Sturdivant), unless judicially admitted in court. Oliver, 35 Ill. 55; Harst. Prac., § 283, p. 98; Parker v. Root (1810), 7 Johns. 320; Griswold v. Lawrence (1806), 1 Johns. 507; Smith v. Pollock (1852), 2 Cal. 92; Borkheim, 38 Cal. 623. A statute in this case required it to be in writing, but it seems an oral stipulation will only be enforced when not denied, or proved beyond a reasonable doubt. Toupin, 12 Ill. 79; Coultas (1867), 43 Ill. 277.

Rules of court often require that stipulations shall be in writing; but it is a serious question if such is the law where no statutes invalidate oral stipulations. Dearing. All oral contracts were valid before the Statute of Frauds, excepting commercial instruments and deeds, and those of judicial record. Must be in writing, if code requires it. Mathews, 106 Ga. 564. Need not be in writing. Chamberlin, 2 Cow. 243. Courts will respect and enforce where a defamation suit was dismissed upon the agreement that defendant would apologize; and the court compelled a compliance. Towns. Sland. & L. 274b; Clare, 8 Dowl. 835.

Oral stipulations as to pleading or evidence cannot be regarded, except as they are admitted by the parties against whom they are invoked. Patterson, 19 Cal. 28; Mathews, *supra*.

Counsel, within the scope of their agency, may make stipulations, and by these bind the parties they represent; they may by stipulation settle the issue to be tried. Bingham, 6 Minn. 136 (instructive case); Gillespie, 39 Ill. 247; Weeks, Atty's, § 223, pp. 389-395. May make proper agreement in regard to the suit. Farmers, 4 McLean, 120; Pike, *supra*. As in the admission of a fact for the purpose of trial. Starke, 11 Ala. 818; Farmers, 11 Md. 389, n., 76 Am. Dec. 256; 1 Add. Conts. 74.

May consent to an order of court irrevocably binding the client. Hart, 1 Cal. 213. Fraud and collusion alone will vitiate. Bingham, 1 Term Rep. (D. & E.) 710; Gaillard, 6 Cow. 385; Wilson, 9 Pa. St. 101.

Stipulations.—

A court may release parties, on motion of either party, on the ground of fraud, mistake, surprise, negligence, ignorance or improvident admissions. Bingham, *supra*; 1 Sto. Eq. Jur. 251.

Stipulation of facts, if inadvertent, may be renounced upon notice. Carnegie, 185 U. S. 403, 444.

Admissions of attorneys within the scope of the agency bind the client. Loomis, 159 Mass. 39, 37 Cent. L. J. 150. Outline citations. *Res inter alios acta*, etc.; Oscan-yan: 41.

Attorneys generally. See AGENTS; *Qui per alium facit*, etc.

STOCK: 2 Bouv. Dic. 1039-1046; And. Dic. 974-978. Corporate stock. Effect of transfers of shares of stock upon liability of unpaid subscription. Rochester, 158 N. Y. 576, 47 L. R. A. 246-264, ext. n.

Stock; increase of, must be by stockholders, and not by directors. Luther, 118 Wis. 112, 99 Am. St. 976, n.: cases.

STOCKDALE v. HANSARD (1839), 9 Adol. & El. 1-243 (36 E. C. L. R.), 44 R. 326, Bro. Max., 1 Kent, 236, 3 Gr. Ev. Cited, Hughes Conts.

Parliament is omnipotent; limitations. Parliamentary privileges are bounded by reason, justice and the forms of law. Thorpe; Sharpless; Loan Ass'n: cases; Cool. Const. Lim. (of the powers which the legislative department may exercise); Marbury; Cool. Const. Lim. 102-154. Are only restrained by constitutions. Leep, 58 Ark. 407, 41 Am. St. 109, n., 23 L. R. A. 264.

Parliaments are limited in their powers, and so are all state departments of government. Stockdale; Marbury; Howard, 1 C. & M. 387 (41 E. C. L. R.), 66 R. R. 871. And so are courts. See CONTEMPTS. Marbury: 142; Cool. Torts, 10; PRESCRIPTIVE CONSTITUTION.

STOCKHOLDERS: Assessments of paid-up stock. Enterprise Co., 58 Neb. 642, 76 Am. St. 122-136, n.

Minority stockholder; right to have corporation wound up. Noble, 133 Ala. 250, 91 Am. St. 27, n. Subsequent stockholders have no standing, as a general rule, to attack prior mismanagement of the corporation. Home Ins. Co. v. Barber (1903), 67 Neb. 644, 60 L. R. A. 927 (it is their right, and not the defendant's wrongdoing, that constitutes a cause of action).

Right to maintain suit. Johns, 137 Ala. 285, 97 Am. St. 27-52, ext. n.

STOKES v. SALTONTALL: L. C. 207.

STOLEN PROPERTY: Restitution of. Bentley. Recent possession of, as evidence of larceny. McClain, C. L. 616, 620, R. v. Partridge: 190. Crime is receiving. See RECEIVING STOLEN GOODS.

STOPPAGE IN TRANSITU. Lickbarrow: 394 (a widely cited case in works on contracts, sales, fraud and negligence; note subjects); Wheeling R. R., 61 Ohio, 551, 76 Am. St. 435, n.; Ans. Conts. 76, 240. 2 Bouv. Dic. 1056-1047, And. Dic. 978.

STOREY v. ASHTON: See M'Manus.

STORY (JOSEPH): Great cases of. Martin: 246; Cinque's Case; Sto. Pl., 4, 10, 26-28, 257, 665, 697, 790, 794.

Section 10, Story's Pleadings, so often cited herein, is as follows:

"But whatever may be the object of the bill, the first and fundamental rule which is always indispensable to be observed is, that it must state a case within the appropriate jurisdiction of a court of equity. If it fails in this respect, the error is fatal in every stage of the cause, and can never be cured by any waiver or course of proceeding by the parties; for consent cannot confer a jurisdiction not vested by law. And, although many errors and irregulari-

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ties may be waived by the parties, or be cured, by not being objected to, the court itself cannot act except on its own intrinsic authority in matters of jurisdiction; and every excess will amount to a usurpation, which will make its decretal orders a nullity, or infect them with a ruinous infirmity. But of this more will be said in another place."

Cited, §§ 5a, 6, Hughes' Proc.; §§ 20, 119, 245, Gr. & Rud.

This section 10 is a cognate of De non apparentibus, etc. Frustra probatur quod probatum non relevat; Verba fortius; Harrison, *sub* Garland: cited, 195 U. S. 133; also of Rushton: 5; R. v. Wheatley: 19, and cognate cases. Codes reaffirm it. See CODES. Much may be deduced from that section and those cases. See also Campbell: 2.

The obligations of society and of government are re-affirmed in this section. Notes to Lamplugh: 301. See PLEADING; SUPREME LAW OF THE LAND.

The integrity of this primal and original obligation depends on the uniform application of *Verba fortius*. Sto. Pl. 665; Dovaston; Cruikshank: 232. See LITERATURE; INDICTMENT; THEORY OF THE CASE; ILLINOIS; MISSOURI. §§ 104-123, Gr. & Rud.

Statutes of amendments and jeofails have been aimed at the obliteration of this section and its cognate maxims to make way for the Theory of the Case and its empirical advocates. See VARIANCE; THEORY OF THE CASE; Rushton: 5; J'Anson: 91; Dovaston: 217; *Verba fortius*.

STORY v. NEW YORK ELEVATED R. R. (1882), 3 Abb. N. C. 478, 90 N. Y. 122-198, 43 Am. Rep. 146-171, 2 Thayer, Const. Cas. 1095; Duyckinck v. N. Y. Elevated R. R. (1891), 125 N. Y. 710, 3 Am. R. R. & Corp. Rep. 744-756, n. (reported in full); Abendroth, 122 N. Y. 1-18, 19 Am. St. 461, 11 L. R. A. 634, 3 Am. R. R. & Corp. Rep. 309-318, 3 Sedgk. Dam. 1187. *Story Case* cited in Blish. Torts, Cool. Torts, 3 Suth. Dam., Dill. Munic. Corp., Beach, Pub. Corp., Cool. Const. Lim. 681.

Abutting owner's rights to passage and light and air cannot be cut off; for these incidents were a part of the original grant, and must be protected as such incidents; a principal thing depends on its incidents. McCulloch; Story; Field, 149 Ill. 556, 41 Am. St. 311-329, ext. n., 24 L. R. A. 406, n.; White, 113 N. C. 610, 37 Am. St. 639; Edmison, 3 So. Dak. 77, 44 Am. St. 744, n., 17 L. R. A. 275; Penn. Mut. Ins. Co., 141 Ill. 35, 33 Am. St. 273, n.; Hussner, 114 N. Y. 433, 11 Am. St. 679, n.; Van Witsen, 79 Md. 405, 24 L. R. A. 403, n.; Selden, 28 Fla. 558, 14 L. R. A. 370, n. (changing grade, vacating, etc., of streets); Egerer, 130 N. Y. 108, 14 L. R. A. 381, n. (railroad in street); Lamm, 45 Minn. 71, 10 L. R. A. 268, n.: cases; Ashland, 106 Ky. 332, 43 L. R. A. 554-565 (no injury to lay track on one side of street and interfere with needed room).

Eminent domain; damages to easements; obstructing a street is damage to abutting owners, and for this incidental injury damages are recoverable. McQuaid, 18 Or. 237, 1 Am. R. R. & Corp. Rep. 35-54, ext. n. (any damages to the right of ingress or egress is actionable. A principal thing depends on its incidents); Montgomery, 104 Cal. 186, 25 L. R. A. 654, 10 Am. R. R. & Corp. Rep. 25-39, n.; Garrett,

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79 Md. 297, 24 L. R. A. 396, 29 Atl. 830, 10 Am. R. R. & Corp. Rep. 30-62, n.; Lockwood, 122 Mo. 86, 43 Am. St. 547-558, 24 L. R. A. 516, 3 Sedgk. Dam. 1180-1211; Longmont, 14 Colo. 386, 5 Am. St. 227, n., 2 Am. R. R. & Corp. Rep. *Contra*: *Abutting owner cannot recover*. Gaus, 113 Mo. 308, 7 Am. R. R. & Corp. Rep. 225-244, n.; Garrett, *supra*; Buhl, 98 Mich. 598, 9 Am. R. R. & Corp. Rep. 173-183, n., 23 L. R. A. 392, n. (vacating a street for a railroad); Green, 78 Md. 294, 44 Am. St. 288, n. (denies right to recover).

Legislature cannot appropriate streets without regard to rights of owners. Story; Taylor: 219. Selling lots with reference to streets gives incidental right to use such street free and unobstructed. Damages result from any impairment of this right. Story; Moose, 104 N. C. 431, 17 Am. St. 681, n., 7 L. R. A. 348; McCall, 56 Pa. 431, 94 Am. Dec. 92-97; Lewis, 25 Or. 133, 42 Am. St. 772, n., 22 L. R. A. 736 (dedication of streets by reference to maps includes them). See Pinnington. A state is bound by so selling lots with reference to a street or easement, and a *fortiori* its agency, a municipal corporation, is so bound. Story; Young v. Raincock: cases.

Vacating streets; liability for. Heinrich, 125 Mo. 424, 46 Am. St. 490-498, ext. n. *Municipal corporation cannot authorize obstruction or nuisance in streets.* Bank, 133 Ala. 459, 91 Am. St. 46: cases.

Owner may eject one using or misappropriating. Bork, 70 N. J. L. 268, 103 Am. St. 808.

Additional servitudes on streets. Mordhurst, 163 Ind. 268, 106 Am. St. 222-268, ext. n.

STOUT v. MASTIN: L.C. 124.

STRATHMORE v. BOWES (Fraud upon marital rights). See MARRIAGE CONTRACTS; Whart. Conts. 266. Cited, § 13, Hughes' Conts.

STRAUDER v. WEST VIRGINIA (1879), 100 U. S. 303, 25 L. ed. 664, 3 Am. Cr. Rep. 515-523: cases; Boyd, Const. Cas. 511, 1 Thayer, Const. Cas. 543, Cool. Const. Lim. 16, 480, 483; Logan v. U. S.; Tucker, Const.; 201 U. S. 27. S. P. Montgomery v. S. (Fla.).

Cited, §§ 86, 111, 213, 266, Gr. & Rud.

Strauder stated: A negro was convicted and sentenced, and by a jury where none but whites could sit as jurors, as provided for by a statute. His case was removed by error to the supreme court of the United States, where it was held that his conviction was wrong under the civil rights act. See CIVIL RIGHTS, §§ 641, 1977-1980, R. S. U. S.; also removal of causes under § 641 (how applied for); Kentucky v. Powers.

Strauder, under § 641, R. S. U. S., filed his application for removal with the state courts, and after conviction and its affirmation in these, he removed the cause by error into the supreme court of the United States. The decision involves the 14th Amendment and various sections of the Civil Rights Acts.

The error must affirmatively appear; it will not be assumed from the mere fact that only whites sat on the jury. Martin v. Texas, 200 U. S. 316. *Omnis præsumentur rite.*

Constitutions deal, in general, in comprehensive language; they declare ends, and the means of arriving at these are

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granted by implication. M'Culloch: 147; *Expressio eorum, etc. Verba intentione debent inservire*; Work v. S.: 242.

Contemporanea, etc., applies in construing the 14th Amendment. See Strauder Case; Slaughter House Cases.

The guarantees of the fourteenth amendment of the constitution of the United States extend civil rights to colored persons. Equal and uniform laws are guaranteed. Cool. Const. Lim. 16, 483, 484; Virginia v. Rives (1879), 100 U. S. 313, 3 Am. Cr. Rep. 524-527; Virginia, 100 U. S. 370, 3 Am. Cr. Rep. 547-575; Neal, 103 U. S. 370; Bush, 107 U. S. 110. See Pace, 106 U. S. 583 (a greater fine may be imposed for adultery between white and black, than otherwise); Dent, 129 U. S. 114 (regulating the practice of medicine).

STREET RAILWAYS: Accident cases. Nellis (1904). Control over. P. v. Detroit Co., 134 Mich. 682, 104 Am. St. 626-658, ext. n.

Not liable for condition of streets. Thompson, 193 Mass. 133, 118 Am. St. 459-483, ext. n.

STREETS: In towns and cities. See Hill v. Boston: cases. Abutting owner; his liabilities. *Sic utere tuo, etc.* Not liable for damages for non-repair. Hay, 127 Wis. 1, 115 Am. St. 977, n.

Rights of. Story v. El. R. R.; McClain, C. L. **STREATHFIELD v. STREATHFIELD** (1735), Cas. Temp. Talb. 176, 1 Swanst. 447, 25 Eng. Reprint, 724, 1 Lead. Eq. Cas. 504-573, n., 10 Rul. Cas. 319, Pom. Eq., Blsph., Beach, 2 Herm. Estop. 1030, 1050; Mews' E. C. L.

Election; doctrine of. One accepting a benefit under an instrument must adopt the whole of it and renounce every right inconsistent with it. One cannot appropriate and reprobate. Bro. Max. 711; Noys, 2 Vern. 581, 23 Eng. Reprint, 978, 1 Lead. Eq. Cas. 503-573, 2 Gray, Cas. Prop. 552, Pom. Eq., Sto. Eq., Beach, 2 Herm. Estop.; Wilbanks, 18 Ill. 17 (under will); Bro. Max. 711; *Re Vance's*, 141 Pa. 201, 12 L. R. A. 227, n., 23 Am. St. 267; Brodie, 2 Ves. & B. 127, 35 Eng. Reprint, 267, 4 Kent, 513 (wills; election under); Conger, 124 Ind. 368, 9 L. R. A. 165, n. (will); Chloupek, 89 Wis. 551, 46 Am. St. 848 (accepting under one deed excludes another). Election in equity. Blsph. Eq. 296-306, 2 Beach, 1068-1089, 10 Rul. Cas. 315-379: cases. Depends on unequivocal acts with knowledge. Pusey, 3 P. Wms. 315-322, 24 Eng. Reprint, 108, 10 Rul. Cas. 315: cases; Dash: 237a. *Allegans, etc.* § 306, Hughes' Proc.

STRIKE: 2 Bouv. Dic. 1050; And. Dic. As an excuse for delay, *sub Denton Case*.

STRICKING A JURY: 2 Bouv. Dic. 1050.

STRICKING OUT PLEADINGS: See P. v. Mc-Cumber: 110; Mews' E. C. L.

STRONG v. S.: L.C. 213a.

STUBBINGS v. EVANSTON: L.C. 49.

STURDIVANT v. HULL: L.C. 410.

STURGES v. BURTON: L.C. 111.

STURGES v. CROWNSHIELD (1819), 4 Wheat. 122, 20 L. ed. 256, Marsh, Const. Dec. 226-251; Tucker, Const.

Since the adoption of the constitution of the United States, a state has authority to pass a bankrupt law, provided such law does not impair the obligation of contracts, within the meaning of the constitution, art. 1, § 10; and provided there be no act of congress in force to establish a uniform system of bankruptcy, conflicting with such law.

Sturges v. Crowninshield.—

The act of the legislature of the state of New York, passed on the 3d of April, 1811 (which not only liberates the person of the debtor, but discharges him from all liability for any debt contracted previous to his discharge, on his surrendering his property in the manner it prescribes), so far as it attempts to discharge the contract, is a law impairing the obligation of contracts, within the meaning of the constitution of the United States, and is not a good plea in bar of an action brought upon such contract.

The obligation of a contract is not satisfied by a *cessio bonorum*; it extends to future acquisitions. But the imprisonment of the debtor is no part of the contract, and he may be released from imprisonment without impairing its obligation.

SUA SPONTE: Spontaneously; of one's own free will; of one's own motion. And. Dic. 989. *E. g.*, all courts *sua sponte* take notice of jurisdiction, and especially of subject-matter, and without respect to the relations of the parties before the court. Campbell v. Porter: 2.

SUBJECT-MATTER: What is the subject-matter to be judicially acted upon (see JURISDICTION; APPELLATE PROCEDURE), or that was acted upon (see *Res adjudicata*; APPELLATE PROCEDURE), and what is presented for construction, are questions of leading import throughout procedure and construction. From a subject-matter much is implied. *Non verbis sed ipsis rebus, leges imponimus*. From it issues the great rule of construction: *Verba generalia restringuntur*, etc.

General words are limited by the subject-matter or persons to whom they relate. Bro. Max. 646-650; Cohens: 244; Blair: 170. And, accordingly, judgments and opinions are limited and restrained by the subject-matter set forth in the common-law record. Therefore, in construing a record, we determine the subject-matter and deductively proceed from it.

S. v. Baughman: 268; *Colwell v. Tinker* (1902), 169 N. Y. 531, 98 Am. St. 587 (judgment for criminal conversation not bankrupt assets); *Coram iudice*.

Codes following other systems are peremptory in the demand for a subject-matter. They require that the cause of action must be described and set forth (see CODES; DESCRIPTION; ALLEGATIONS; CAUSE OF ACTION; *Quis, quid coram quo; Citatio; Citationes*), and that the filing of an answer will not waive the failure to describe a cause of action, and that all relief must accord with the subject-matter described. What is described for adjudication is a question that arises

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generations later, as in *Outram v. Morewood, Trevivan v. Lawrence* and *Kingston's Case*. In each of these cases the leading question was: what was the subject-matter presented and adjudicated by the court of original jurisdiction? Here is a phase that shows its importance in *res adjudicata*, and we may also see it in the removal of causes, where one looks after the subject-matter presented for adjudication to see if it is removable in character. (See REMOVAL OF CAUSES; VARIANCE.) And similarly the question arises in a court of appellate jurisdiction, where one leading question is: what was the subject-matter *first viewed*? And this must be determined before a court of errors can review it. Here, as in *res adjudicata*, identity of subject-matter must be disclosed.

From such requirements is seen the importance of the rules of pleading that require certainty (see CERTAINTY; VARIANCE), jurisdiction and cognate subjects. (Rushton: 5; Windsor: 1; SUPREME LAW.) And accordingly, why the conclusion of law is so obnoxious to certainty and the due administration of justice (see CONCLUSIONS OF LAWS), why it is a nullity and cannot be aided by denials or pleading over. Rushton: 5.

The rule is imperative, that a subject-matter must be described, and it must constitute a wrong known to the laws of the land. This was discussed in the hearing of Paul. A conclusion of law presents no subject-matter, nor is it a traversable allegation that can be a foundation for an issue of fact to be submitted to a jury. A matter of law cannot be submitted to a jury. (*Ad questionem*; Max. No. 4: §§ 89-104, Hughes' Proc.; *S. v. Croteau*: 271.) A question of law cannot be referred to a wrong department of state power; the division of state power is involved, and forbids this.

The idea of subject-matter cannot be departed from. That consent cannot confer jurisdiction of it, is a most commonplace rule (Sto. Pl. § 10; Cruikshank: 232), and equally and exactly alike in all systems. The code most plainly recognizes it, where it provides that filing an answer will not waive a failure to describe a subject-matter. From this much may be deduced for collateral attack, motions in arrest, and the

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ground of the general demurrer, which is never waived. And it is well to note that this ever involves an investigation of subject-matter. Sometimes this appears as very small and commonplace, and even waivable in character (see *THEORY OF THE CASE*), and again, as a profoundly constitutional question, as in *Milligan's Case*, or where an ambassador or a consul is involved. Martin: 246; Cohens: 244. It is always of great import and dignity, and it cannot be overlooked in pleadings nor in jurisdiction. See *Jurisdiction*; *Fabula*; PLEADINGS.

A subject-matter must be described, and with certainty, for the uses of the removal of causes, for appellate procedure, *res adjudicata*, due process of law, and the various other censoring principles. And to the description made there sternly applies *Expressio unius*, etc.

See pp. 8-32, INTRODUCTION, Hughes' Proc.; IDENTIFICATION; Fish v. Cleland (Ill.): 12c; Mallinckrodt (Mo.): 12a; Devine v. Los Angeles.

In pleading, a subject-matter is a wrong, civil or criminal, and it is this wrong that must be described. Rushton: 5; R. v. Wheatley: 19; Cruikshank: 232.

Jurisdiction depends upon a wrong—a subject-matter described, and this is the principal thing sought, and it must be established and made tangible before other rights annex themselves. Without a lawful subject-matter described at the right place and in the mandatory record, the proceedings are *coram non jure*. JURISDICTION; MANDATORY RECORD; *Quod ab initio*.

A ground of recovery or of defense must be stated as a subject-matter to give a pleader the right to proceed.

Vinson, 64 Ark. 453, 39 L. R. A. 415; Osborn v. Bk.; S. v. Baughman: 268. Campbell: 2. See 210 U. S. 230.

And this is why the ground of the general demurrer is never waived.

Davenport v. Gannon, *sub* Mostyn v. Fabrigas: 274 (land in another state); Blair v. Reading: 170; § 13, Hughes' Proc.

The subject-matter of every issue must be positive and certain; allegations must be direct, certain and positive. See ALLEGATIONS; CERTAINTY; *Res adjudicata*; PLEADINGS. And denials are governed by the same rationale. See DENIALS; Poor: 37.

Description of a subject-matter is essential to invest a court with juris-

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diction of it, the principal thing, and also to inform the court how to treat it, and accordingly as it is common law, civil, criminal, or equitable, and whether it must be presented as codes prescribe or according to criminal procedure. Windsor: 1; Blair: 170; Munday: 79; R. v. Wheatley: 19. See DESCRIPTION; ALLEGATIONS.

A description of land is essential in a suit for its possession (*Schaumtöfel*, 77 Ill. 562), or for specific performance.

The same subject-matter cannot be in two courts at the same time. Borden: 267; Freeman v. Howe: 287; *Custodia legis*.

Bona fide subject-matter essential to confer jurisdiction. Wonderly: 102; California: 270; Weltmer: 268a; Beaumont: 387; Scott v. McNeal; S. v. Baughman: 268; Bro. Max. 329, 342, 971. See SHAM PLEADINGS; CONTEMPTS; Rensberger.

Construction is led by subject-matter. Smith, Construc. 498, 531, 704; Suth. Stat. 218; Sedgk. Stat. 359. *Non verbis sed ipsius rebus leges imponimus; Verba generalia, etc., supra; Verba non tam intuenta, etc.; Verba nihil operari, etc.; Verba offendi, etc.; Nihil facit error nominis, etc.* § 274, Hughes' Proc.

Construction of contracts is from subject-matter. Blakely, 80 Am. St. 821. See Robinson: 309.

The dog may have his first bite, but the bear cannot. May v. Burdett; Melius. The wife is presumed to act from coercion. The infant must be served with process. Galpin: 63. The assured must fully and truly disclose to the marine underwriter. *Caveat emptor*. See CONSTRUCTION; STATUTE.

SUBMISSION: 2 Bouv. Dic. 1053, 1054.

SUBORNATION OF PERJURY: 2 Bouv. Dic. 1054; 2 Bish. Cr. Proc. 1019-1023.

SUBPOENA: 2 Bouv. Dic. 1055. Must be served in civil cases twenty-four hours before trial, but not in criminal cases. 1 Gr. 314; 1 Wh. Ev. 378, 381.

SUBPOENA DUCES TECUM: 2 Bouv. Dic. 1055; And. Dic.; Wertheim, 15 Fed. Rep. 716-722, n. R. v. Inhabitants of Llanfaethly (1853), 2 El. & Bl. 940 (75 E. C. L. R.), 11 Rul. Cas. 451, n. (refusal of witness a contempt; secondary evidence not admissible).

SUBROGATION: Doctrines of. Dering v. Winchelsea; American Bonding Co. v. National Bank (1903), 97 Md. 598, 99 Am. St. 466-533, ext. n.; Wilkins v. Gibson (1901), 113 Ga. 31, 38 S. E. 374, 84 Am. St. 204, n.; Sands v. Durham (1901), 99 Va. 263, 38 S. E. 145, 86 Am. St. 884. 2 Bouv. 1056-1059; And. *Who may pay and be subrogated.* Davis v. Schleimmer Adm'rs (1897), 150 Ind. 472, 477, 478; Warford v. Hawkins (1898), 150 Ind. 489.

Right of partner to, who pays firm debt. Sands v. Durham (1900), 98 Va. 392, 54 L. R. A. 614, n.

SUBSCRIPTIONS: As mutual promises. Ans. Conts. 72, n. See Wightman v. Coates.

SUBSTANCE OF THE ISSUE: It is sufficient if proven. 1 Gr. 56-73; 1 Ell. Ev. 194-204.

SUBSTANTIVE LAW: Distinguished from adjective law. See **ADJECTIVE LAW**; *Texas R. R. v. Humble*. § 20. Hughes' Proc.; See **PREFACE**; §§ 41, 151, 257 Gr. & Rud.

SUCCURRITUR MINORI; FACILIS est lapsus juventutis: A minor is to be aided; youth is liable to err. See **INFANTS**.

SUGGESTIO FALSI: Suggesting falsehood. § 103, Hughes, Conts; *Suppressio*.

SUICIDE: 1 McClain, C. L. 161, 2 Bouv. 1065, 1066, And. Dic., 1 Bish. C. L. 652, 2 *id.* 1187, 2 Best, Ev. 434, 435, n., 726-754 (excellent resume). *Defeats insurance, when*. See **INSURANCE**; *Volenti*, etc. Person must be of years of discretion and of sound mind. Weber, 172 N. Y. 490, 92 Am. St. 753.

Attempt is not a crime. May, 101 Me. 516, 7 L. R. A. (N. S.) 286 (relief by *habeas corpus*), 115 Am. St. 335. *Contra R. v. Cruse*: cases.

SUMMA RATIO EST QUAE PRO RELIGIONE FACIT: That rule is strongest which determines in favor of religion. Bro. Max. 19-21; Trist: 214; Church; Riggs; Burton; Oxford's Case; Kirven; Keech; S. v. Sheppard; Dimes: 176; Wonderly; 102. *Cited*, §§ 1, 46, 50, 77, 100, 122, 123, Gr. & Rud.

Summam esse rationem quae pro religione facit: That consideration is strongest which determines in favor of religion. Dig. 11, 7, 43; *cited in* Grotius de Jure. bello, 1, 3, c. 12, s. 7. *Lex est sanctio sancta*, etc.

Cited, pp. 13, 34; §§ 5, 5b, 13, 14, 18, 76, 159, 167, 183, Hughes' Proc.

Public policy, necessity, morals, reason and convenience greatly contribute to the law. They are the grounds and rudiments of law. *Quod inconvenientis*, etc.; *Necessitas inducit privilegium*, etc.

SUMMONS: See **PROCESS**; **JURISDICTION**; *Ald. Jud. Writs*; And. Dic.; Brown, Jurisdic. The office of a summons is to notify, and to afford an opportunity to be heard. Accordingly, if a party appears without an objection to the summons made, and not abandoned, then he waives a summons and also all objections to it. *Thomas v. Citizens' Bk.* *Verba nihil operari melius est quam absurde*. See **ABATEMENT**. *Cf.* White: 130; Harkness: 152; **NOTICE**.

Jurisdiction of subject-matter is conferred by a statement of a cause of action, which of course cannot be waived. *Rushton*: 5. These distinctions must be rendered clear; they are most important. *De non apparentibus*, etc.

SUNDAY: How regarded in procedure. *Dies dominicus*, etc.: Crepps: 113; Hauswirth: 51; Langabier: 147a; S. v. Conwell: 174.

There is no Sunday law without a statute. Neither the civil law of Rome nor the common law of England ever had or enforced a Sunday law which did not arise from or depend upon a statute. For its validity and force they looked to or from a statute, and not from conceptions influenced and directed by convictions that Sunday is a sacred or a divine institution.

The contentions of jurists and theologians are old and extended as to the origin and divinity of the Sab-

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bath. In connection with these we are reminded of Kent's apostrophe to *Shelley's Case*. See also **EQUITV**. The position of the jurist is that there is no Sunday without a statute, except what falls within *Dies dominicus*, etc. *Pepin*, 23 R. I. 81, 60 L. R. A. 626, n.; *Story*, 8 Cow. 27, 18 Am. Dec. 423 (by the common law, then, it appears, all judicial proceedings are prohibited. All other acts are lawful unless prohibited by statute); 60 L. R. A. 628. In other words, the only command in the common law for the observance of Sunday must be confined to *Dies dominicus*, etc., which, in the last analysis, is a rule of judicial procedure, and it simply declares that jurisdiction cannot be exercised on Sunday. The rule is that *judicial* acts done on Sunday are absolutely void, not merely voidable. Such acts are, in the parlance of lawyers, *coram non iudice* (proceedings without authority), and are open to collateral attack upon that ground. But this is not true of *ministerial* nor *legislative* acts. *S. v. Conwell*: 174.

In contract law we must look for a statute to invalidate the contract made on Sunday. A deed may be executed and delivered on Sunday. *Bloom v. Richards*. (This is a widely cited case on contract.) *Smith*, Conts. 277-279: cases; Hughes, Conts.; *Swan v. Broome* (1764), 3 Burr. 1598; *Allen v. Deming* (1843), 14 N. H. 136.

*The first official edict recognizing Sunday was from the Roman throne; it was an edict of Constantine the Great, about 312, A. D., ordering all work to cease in the cities "on the venerable Sunday," but permitting necessary husbandry to be attended to. Necessity was recognized as a higher law. Langabier: 174a. This statute was not enacted from piety toward God, but out of politics and to please the Pagans, who worshipped the Sun and who memorialized Constantine to establish the Sunday, the day of their Sun God, of their games and worship. The Constantine statute has been borrowed by other countries. Jurists construe such statutes consistently with the original intent. *Verba intentione; Melius petere fontes quam sectari rivulos*.*

The first statute on the subject in England was 27 H. VI, ch. 5 (A. D. 1449). This was followed by 1 Jac. I (A. D.

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1603, ch. 22, § 28, 3 Car. I, c. 1; 29 Car. II (A. D. 1677), c. 7. See Banks v. W., 13 Ind. 203, 13 Am. Law Mag. (1860), p. 423 (instructive *resume*); 2 Pars. Conts. 898, 7th ed.: cases.

Wherever English statutes are adopted as a part of the common law, nice questions may arise as to the validity of a Sunday contract, arising from the pursuit of one's "ordinary calling." 2 Pars. Conts. 898, 1 Chit. 588-591. These authorities should be consulted.

The case of *Scarfe v. Morgan* (1838), 4 M. & W. 270, 1 Horn & H. 292, 12 Crim. Law Mag. 747, 2 Benj. Sales, 845, 2 Rand. Com. Paper, 520, 2 Bish. C. L. 954, Pars. Conts., Chit., Bro. Max., is widely cited in contract works in relation to what is within "ordinary calling."

Crepps involved the construction of the statute. It was held that the statute is penal and must be strictly construed, and that a person can violate the statute but once on the same day. Every stitch the tailor takes, and every bun the baker bakes, is not a separate and distinct offense. *C. v. Louisville R. R.*, 80 Ky. 291, 44 Am. Rep. 475, 3 Crim. Law Mag. 632-647 (work of necessity); *Wilkinson v. S.*, 59 Ind. 416, 26 Am. Rep. 84, 2 Crim. Rep. 596, 4 Crim. Def. 659, (hauling melons to market is a work of necessity); *Ungericht v. S.* (1889), 119 Ind. 379, 12 Am. St. 419, n. (whether barbering is a work of necessity is a question of fact); *S. v. Sopher* (1903), 25 Utah, 318, 60 L. R. A. 468.

In *Scarfe*, *supra*, a mare was sent to a farm to be served and the service was performed. The farmer claimed a lien on the mare for his services. To defeat his claim illegality was pleaded under a statute prohibiting labor of usual calling on the Sabbath. *Held*, the defense was bad, because keeping a stallion was not the ordinary labor of a farmer. (This case is also important upon the *lien of agents*. See *Story*, *Mech. and Whart. Ag.*, citing the *Scarfe* Case.)

Lord's Day or the Christian Sabbath. 2 Bish. C. L. 949-970, 12 Crim. Law Mag. 735-766, 961-979. *Sunday contracts.* 2 Beach, Conts. 1611-1630; McClain, C. L. 1319-1326.

A Sunday contract, when made void by statute, cannot be ratified. *Acme Electrical*, 127 Mich. 341, 89 Am. St. 476 (void contracts cannot be ratified); *S. v. Conwell*, L. C. 174 (arrests on Sunday); *Quod ab initio*, etc.

It is a penal offense to trade on Sunday. *Howe*, 113 Wis. 375, 116 Wis. 91.

Sunday contracts are not void as against public policy. *Rodman*, 134 N. C. 503, 65 L. R. A. 682-688: cases (*Cites Bloom and edict of Constantine*). See *Mech. Sales*, 1052-1059. Are void if executory. *Richards*, 98 Md. 136, 103 Am. St. 393-399, ext. n.

Sunday is dies non juridicus. 12 Johns. 178, 180. Dies dominicus, etc. *S. v. Conwell*, 174; *Davis v. Fish* (la. Judgment on, void). § 126, Gr. & Rud.

SUNDERLAND MARINE INS. CO. v. Kearney (1851), 16 Q. B. 925, 1 Chit. Conts. 77, 78. Real party in interest may sue on a bond. § 132, Hughes, Conts.

SUPERFLUA NON NOCENT: Superfluities do no injury. *Jenk. Cent.* 184. *Surplusagium non nocet; Utile, etc.*

SUPERIOR AND INFERIOR COURTS:

Distinctions. See *COURTS*; *Crepps*: 113; *Bloom*: 266; *Kempe*: 115. § 13, Hughes' Proc.

SUPERSEDEAS: Implied power of courts to issue supersedeas. *S. v. Board of Education* (1898), 19 Wash. 8, 67 Am. St. 706-722, ext. n. See *PROHIBITION*; 2 Bouv. 1070; *And. Dic.*

SUPERVACUUM ESSET LEGIS CONDERE NISI ESSET QUI LEGES TUERETUR: It would be superfluous to make laws unless the laws when made were to be enforced. *Brac.* 107; *Chisholm v. Ga.*

SUPPLEMENTARY BILL: 2 Bouv. Dic. (Bill), 245, 1071; 16 Cyc. 357-363.

SUPPLEMENTARY PLEADINGS Under the code. *Bernard*, 160 Mass. 162, 39 Am. St. 465, n., 5 Encyc. Pl. & Pr. 631; *Hurd v. Case*; *Bliss*, Pl. 345a, 432a. *Puis darrein continuance:* New matter may be presented in equity upon leave. *Sto.* Pl. 903. And under codes. *Bliss*, Pl. 432. See *REVIVOR*.

Must relate to antecedent subject-matter and constitute no departure. *Swedish-Am. Bk.*, 6 N. D. 222, 49 L. R. A. 285, notes. May be filed at any time. *Harrigan*, sub *MAGNA*.

SUPPLEMENTARY PROCEEDINGS: See *CREDITOR'S BILL*; 2 Bouv. Dic. 1071; *Lathrop v. Clapp*, sub *Boni judicis*. Lien acquired by service of papers. *McConnell*, 70 Kan. 375, 3 L. R. A. (N. S.) 122-134, ext. n.

SUPPLY DITCH CO. v. ELLIOTT (1887), 10 Colo. 327, 3 Am. St. 586.

Admission by pleading. A plea of tender conclusively admits an indebtedness to the extent of the tender. 1 Gr. Ev. 204. See *TENDER*; *ADMISSIONS*; *Ansley*; *Dickson*: 34.

A demurrer admits all facts well pleaded. *Supply*; *Hopper*: 4. See *DEMURRER*.

Held that argumentative pleading is bad under all systems. *Supply*; *Dovaston*: 217; *Hume*.

This and the *Robinson Mining Case* (L.C. 16) afforded the court the finest opportunity briefly and tersely to state the facts in each, and that these facts were analogous to *Rushton*: 5. Such a statement and citation would have made the most admirable of decisions, had not *Robinson*: 16 carried the rule too far. But the *Supply Ditch Case* is not so questionable. It is not only wrong, but viciously wrong. See *Hughes' Proc.*; *Breeze*; *Rensberger*; *Russell*; *COLORADO*.

SUPPORT: Failure to furnish. *McClain*, C. L., q. v.; *R. v. Conde*.

SUPPRESSIO VERI: Suppression of the truth. 2 Bouv.; *And. Dic.*, § 103, Hughes, Conts.; 11 Wend. 374-417; 23 Barb. 521-525; *Suggestio*.

SUPREME COURT: See *APPELLATE PROCEDURE*. Have superintending control of inferior courts. *P. v. Richmond* (1891), 16 Colo. 274, 279. Is to establish the law. See *Stare decisis*. Is paramount in government. *Marbury*: 142. Duties of. *THEORY OF THE CASE*.

Are bound by their records. Can not condemn by usurpation. *Horan*: 85; *Omaha Bank*, 73 Neb. 351, 119 Am. St. 903 (cannot authorize judgment against persons not before the Court). *Pennoyer*: 58; *Audi*.

Original jurisdiction of: limited to matters of a public interest. *Atty. Gen. v. R. R.*, 35 Wis. 425-608 (strict construction).

May order judgment when the facts are admitted. *McAfee v. Reynolds*. See *Ad*

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questionem; APPELLATE PROCEDURE; Bonnell: 185: cases.

SUPREME COURT OF THE UNITED STATES: Its appellate jurisdiction. Martin: 246; Cohens: 244. Its original jurisdiction. Marbury: 142.

Its appellate jurisdiction over final judgment of state courts. Martin: 246.

See §§ 5a, 10-12, 213, Hughes' Proc.

SUPREME LAW OF THE LAND: The supreme law of the land is defined thus: "This constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land and the judges of every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." Art. VI, Const. U. S.; § 8, Hughes' Proc.; *In presentia*.

Includes international law. §§ 36, 78, 79, Gr. & Rud.

Depends on conserving principles. §§ 58, 83-123, 107, 137-140, 147, 211, Gr. & Rud. Construed by civil law. §§ 79, *id.* The parts of. §§ 24, *id.* Depends on construction. §§ 118-123, 136-140, 211-212, *id.*

Here are paramount obligations to which all other laws, ordinances and regulations must yield. *In presentia majoris cessat potentia minoris*. Martin: 246; Marbury: 142; Cohens: 244; Tarble's Case: 247; Needham: 261. The above cases have tremendously contributed for the unification and simplification of the laws. Great results can be traced from Mills: 57; McElmoyle: 56; Pennoyer: 58; Windsor: 1; Needham: 261, and Haddock. Throughout these great cases may be discovered the above obligation, the duty it imposes and respect for it. § 213, Hughes' Proc.

Original covenants and compacts are fountains from which tremendous streams may be traced. If one would know the stream he must know the fountain. *Me lius petere*, etc.; see EQUITY. From the supreme laws of the land great extents may be traced, and especially from the principle in *McCulloch* (a principal thing carries its incidents). From this view note that the removal of causes, the appellate jurisdiction of the supreme court of the United States over the final judgments of the highest court of every state where a federal question is involved, calls for certain incidents, and among these are the means for the protection of these principal ends. Means for these ends are pleadings, and at least the mandatory record. Without these, the above parts of the supreme law of the land would fail; therefore pleadings and the mandatory record are constitutional implications. They cannot be waived. Lead. Cas. 222-233. Accordingly are pointed out paramount obligations that are not clear in many quarters. See LITERATURE; 2 Thomp. Trl., §§ 2310, 2311; And. Steph. Pl., § 230: cases. These discordant discussions will remind the reader of wrangles over *Shelley's Case* as told in *Kent's* apostrophe thereto.

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Discordant views and reasoning alone can find and establish such stumbling blocks as are referred to, namely, that pleadings and the mandatory record can be waived. The great works on pleadings, of Chitty, Stephen, Gould, Bliss and Pomeroy are not comprehended as an entirety, and unfolded and traced from the supreme laws of the land, the great high fountain.

The efforts of these great authors originate from incidents and reflected parts of the supreme law of the land. From such starting points they have not elucidated the great subject so as to establish it as an essential bulwark of protection in all states. A view from a mole hill is very different from that from a mountain—from a commanding view all can be seen. Pp. 26-28, Hughes' Proc.

See *Res adjudicata*: cases; CERTAINTY; MANDATORY RECORD; PLEADINGS; PROCEDURE; JURISDICTION; COLLATERAL ATTACK; DIVISION OF STATE POWER; CONSTITUTIONALISM; SUBJECT-MATTER.

Looking from the requirements of removal of causes from state to federal courts, and of "courts of appellate jurisdiction only," of *res adjudicata*—former jeopardy,—constructive notice, collateral attack, for the judgment and its foundation (the mandatory record), the execution levy, sale and sheriff's deed in proving a title founded upon judicial and execution sales, for essential means of investing a court with jurisdiction of a subject-matter, what is a material, an immaterial and a collateral issue, to determine what are material issues in questions of perjury, what is necessary to empower a court with jurisdiction to call witnesses and take testimony (Munday: 79), in brief, a definite theory of procedure, and for the force and effect of a judgment, which is a species of contract, the properly introduced and intelligent student must pause with amazement at the departures of a multitude of courts from the commands of the highest obligations imposed upon all citizens, and especially upon judges, for they are expressly named to be bound.

A judgment is the result of the operation of procedure's rules, and when established it becomes the pre-eminent class of contracts. Consequently the relations of contracts and procedure are very close and intimate.

Beyond any of the great works we have named, and beyond all works on contracts, we have sought to present the means of judging of the force and effect of contracts of the greatest dignity, namely, judgments. About these, new views are abroad in several states. (See LITERATURE; Dovaston: 217; J'Anson: 91; DUE PROCESS OF LAW.) To judge of that view we must explicate upon a deductive plan. Hence, the foregoing observations and the introduction of much matter that otherwise might be omitted. See INTRODUCTION; §§ 1-12, Hughes' Proc.

The reader cannot fail to observe that well written and attractive phrases of

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accomplished rhetoricians, however inconsistent and unreflecting, can becloud if not destroy the jurisprudence of a state. *See LITERATURE; Cujus est instituire.*

Procedure and contracts may at this time be introduced from the supreme law of the land to great advantage, and here let us observe, that construction of contracts issues and is moulded by conceptions arising from the supreme laws of the land. *See WAIVER.*

The constitution, treaties and laws of the U. S. are the supreme law of the land. Art. VI. Const. U. S.; Martin: 246; Cohens: 244; Tarble's Case: 247.

And all judges, federal and state, of every grade, are obligated to respect, maintain and enforce these. Art. VI. Const. U. S.; McCulloch: 147; Martin: 246; Cohens: 244; Tarble: 247; Marbury: 142; Lane v. Dorman; S. v. Tufts (1890), 20 Nev. 427, 19 Am. St. 374, n.

Procedure involves it. *See INTRODUCTION; Tarble's Case: 247; Furman: 147a.*

Sovereignty; its mandate omnipotent. Suth. Stat. 29. Cool. Const. Lim. 197, 6th ed. *See Oakley: 66, 222; P. v. Turner: 252. See PRESCRIPTIVE CONSTITUTION.*

Both state and federal courts bound by. Davis v. Burke (1900), 179 U. S. 399. But it is unpleasant for federal courts to interfere with state courts, and they will only do so as a last resort. Howard v. Fleming. Both systems have jurisdiction of, if consistent with the constitution. Robb, 111 U. S. 624, 637; Gibson, 162 U. S. 565, 591.

In pari materia. Fundamental principles of equal dignity must be construed to accord. Dick v. U. S., 208 U. S. 340; *Concordare.*

SURETIES: Discharged by acts of principal and creditor. Abel: 334; cases; Rees: 334a; King: 334b.

Proceedings by surety to compel principal to perform his obligation. Tellis v. Folmar (1906), 145 Ala. 176, 117 Am. St. 31-41, ext. n.

Duty of creditor to surety. Davenport, 126 Ga. 136, 115 Am. St. 68-102, ext. n.

Liability on official bond for unauthorized acts done *colore officii*. Are liable for usurpation of authority—jurisdiction by a mayor. S. Ex rel. McLaurin v. McDaniel (1900), 78 Miss. 1, 50 L. R. A. 118, n. *See OFFICERS.*

Acts for which sureties on official bonds are liable. Feller v. Gates (1902), 40 Or. 543, 91 Am. St. 492-579, ext. n. *See OFFICERS.*

Acts of, after termination of office. Blades, 136 N. C. 176, 103 Am. St. 924-941, ext. n.

Guaranty genuineness of antecedent signatures. Wheeler, 21 Ky. L. Rep. 1416, 49 L. R. A. 215, n.

Legal powers and privileges of surety and trust companies. Estate of John Clark (1900), 195 Pa. 520, 48 L. R. A. 574-596, ext. n.

SURETYSHIP: 2 Bouv. 1079-1085; And. Dic.: Rees: 334a; King: 334b.

SURPLUSAGE: *Frustra probatur; Non valet impedimentum; Surplusagium; Falsa; 2 Whart. Confs. 668; 1 Gr. Ev. 63; Frustra fit per plura, etc.* *See Russell v. Shurtleff.* §§ 251, 260. Hughes' Proc.; §§ 53, 254, 272, 278, Gr. & Rud.

Need not be denied. *See DENIALS; CONCLUSIONS OF LAW.* Repetition forbidden. Sturges: 111. *See Utile per inutile.* *Redundant, immaterial and irrelevant matter stricken, on motion.* Pom. Rem. 551. P.

Surplusage.—

v. McCumber: 110. It has no effect. Garland: 60. *See CONCLUSIONS OF LAW.* Unless descriptive. Bristow: 135; Kraner: 299; 1 Gr. Ev. 63. Surplusage to be avoided in bill of exceptions. *See Id.* Must be marked out and demonstrated. Sto. Pl. 267, n., 457. Should be stricken on motion, § 5a, Hughes, Proc. Repugnant matter is sometimes surplusage. 1 Chit. Pl. 231, 12 Am. ed. The first statement prevails. 1 *Id.* 231.

In appellate procedure; party at fault should pay costs of. *See COSTS.*

Matter in the statutory record that belongs to the mandatory is, also vice versa. Planing Mill Co.: 2d; Jackson v. Ashton (allegations in a caption are). These are important rules.

SURPLUSAGIUM NON NOCET: Surplusage does no harm. 3 Bouv. Inst., n. 2949; Bro. Max. 627. *See SURPLUSAGE; Utile, etc.; Superflua, etc.; Russell v. Shurtleff.*

Cited, §§ 121, 252, 259, 273, Hughes' Proc.; §§ 96, 167a, 271, 311, Gr. & Rud.

Dilatory, abatement pleadings; surplusage vitiates. Kraner: 299.

An application of this maxim may be illustrated thus: Where there are two methods of review in appellate procedure, and the review is the same upon the record after joinder in error, and as appellant should appeal in a case that could not be appealed, but which could be reviewed in the same appellate court on error, and the appellee should waive appeal process and proceedings and join in error, this in substance would waive all that related to an appeal bond (*see APPEAL BOND*). Also issuance of summons and its service in effect would be a submission of the cause upon its merits, and upon proceedings in error. This the appellate court would favor, in order to avoid delay, circuitry and multiplicity of actions, and agreeably to the rule that a hearing on the merits should be speeded, not delayed, and that vain and fruitless things should not be required. Joining in error is tantamount to a stipulation to waive appeal process and also the process on error and to submit the record for review on its merits. *Expressio eorum, etc.* Such waiver nowise involves *Salus, etc.*, and therefore the court would not *sua sponte* raise waivable matter, after it is waived; for this is contrary to essential and fundamental rules in procedure. *Consensus, etc.* *See Bristow: 135; Dickson: 34; Mutual Ins. Co. v. Dingley.*

SURVIVAL OF ACTION: *Actio personarum.*

SURVIVORSHIP: In case of death. *See DEATH; Middeke, 198 Ill. 590, 92 Am. St. 284, n. Presumptions of survivorship among those who perish in a common calamity.* Wilbor, 20 R. I. 126, 51 L. R. A. 863-887, ext. n. Presumption of death after seven years' absence. 1 Ell. Ev. 112, 113. *See DEATH.*

SUTTON v. CLARKE (1815), 1 Marsh. 429, 6 Taunt. 29 (1 E. C. L. R.), 2 Thomp. Neg. 807-827, ext. n., Shear. Neg., Bro. Max. 7, 2 Add. Torts, 1041-1043, 1306, 1321 (joint trespassers). Mech. Ag., Sto.: Cool. Torts, Bish.; Gould, Wat., Mech. Pub. Off., 2 Dill. Corp. 900, 1 Beach, Corp. 210, 1 Thomp. Neg. q. v.

Sutton v. Clarke.—

Sutton stated: Clarke was chairman of the board of road trustees. The board ordered an improvement of the highway, and a competent surveyor, at C.'s request, examined and planned the work. In pursuance of this plan a ditch was dug, which proved of insufficient capacity, and by reason of this, flood waters were discharged upon S.'s lands, causing damage, for which he sued. C. defended on the ground that he acted under a general law for the benefit of all (*Hill v. Boston*), and that he acted *bona fide*, without malice and under competent advice (Bish. Torts, 118, rationale). *Held:* S. could not recover.

See Rochester White Lead Co.; Whitehouse v. Fellowes; Hill v. Boston; Nowell v. Wright; Bailey v. Mayor, etc.; Sto. Ag. 319; Story, Bailm. 461; Robertson, 127 U. S. 507.

A wrongful act causing damages is essential for a tort. Ashby: 273; Blyth Case.

It seems only superior judicial officers have, for their class, established immunity for corrupt acts. Bradley v. Fisher; Yates; Lange: 159.

Patent defects in the construction of public works, followed by damage, are actionable. Rochester White Lead Co.; Whart. Neg. 988; Shear. Neg. 579.

Illegal act combining with an accident is actionable. Salisbury. Defective construction, followed by damage, comes within the same reason. Blyth Case.

Officers acting bona fide and carefully under general statutes for the public good are not liable. Sutton; Hill v. Boston; Bro. Max. 100; Tremain; Donovan (1881), 85 N. Y. 185, 39 Am. Rep. 649; Mech. Pub. Off. 796.

Joint trespassers are severally liable, and one or all may be sued. Sutton; Kirkwood; 2 Add. Torts, 1321, Bish. 521; Ang. Wate. 420. *See* JOINT TRESPASSERS; ELECTION OF REMEDIES.

Non-liability of a public officer for an injury committed while acting gratuitously and in good faith. Sutton; Bartlett: 6; Nowell v. Wright; Savacool: 164; Lange: 159; Mostyn: 274.

SUTTON v. WAUWATOSA (1871), 29 Wis. 21, 9 Am. Rep. 534, Bigl. L. C. Torts, 711, Smith. Cas. Torts, 115, Cool., Bish.; Whart. Neg.; 146 Mass. 601, 4 Am. St. 359; Suth. Dam., Thomp. Neg., Dill. Munic. Corp., Busw. Pers. Inj. *See* Hall v. Corcoran: 369; § 347, Hughes' Proc.

Contributory negligence. *In jure non remota*, etc. One injured by defective highway may recover, although he was using it on Sunday.

SWAN v. NORTH BRITISH AUSTRIAN Co. (1863), 7 Hurl. & Nor. (Eng.) 633, 2 Hurl. & C. 175, 11 Rul. Cas. 100, Bro. Max. 258, 292, Mews' E. C. L.; cited and approved in Merchants' Bk. v. S. Bk.; Ewart, Estoppel; 70 L. R. A. 790.

Equitable estoppel. One is not permitted to charge the consequences of his own fault on others, and complain of that which he himself has brought about. *Nullus commodum, etc.*, sub Williams: 93; Adams: 326. *Only a wronged party can complain.* Williams v. Eggleston: 94; Gibler: 96; *Actio, etc.* Hibblewhite, Pickard, Master v. Miller, and Turner v. Evans, are cited and discussed.

SWEARING; PUNISHMENT FOR: McClain, C. L. 1159, 1160. *See* NUISANCE.

SWEENEY v. OLD COLONY, ETC. R.

R. (1865), 10 Allen, 368, 1 Thomp. Neg. 408-432, ext. n., 87 Am. Dec. 644, Redf. Am. Ry. Cas., Smith, Torts, 308, Bigl. Lead. Cas. Torts, 702, 46 L. R. A. 63, Mech. Ag. 658, Hutch. Carr., Cool. Torts, Bish., Whart. Neg., Shear. Neg., Thomp. Neg., g. v., Busw. Pers. Inj. 66-70, 79.

Sweeney stated: S. was crossing the railroad track in a wagon, in Boston. A flagman of the railroad signaled S. to stop, which he did, and next the flagman beckoned S. to cross, which he undertook to do, but became frightened and jumped from his wagon into danger (Gibney v. S.), and because of this he was run over. *Held,* the railroad was liable.

Pomponio v. N. Y., 66 Conn. 528, 32 L. R. A. 530, n. *See* Butterfield; Volenti. *Going on and crossing railroads.* Davies v. Mann; Bish. Torts, 1034; 1 Add. 547; Busw. Pers. Inj. 66-70.

"Stop, look and listen," a duty. Oleson, 143 Ind. 405, 32 L. R. A. 149, n.; Howe, 62 Minn. 71, 54 Am. St. 616, n., 55 Am. St. 287, Busw. Pers. Inj. 69, 161; R. v. Houston (1877), 95 U. S. 687, 1 Thomp. Neg. 444, n., 6 Cent. L. J. 132, 5 Rep. 164; 2 Beach. Pub. Corp. 1537, Cool. Torts, 798, 817; Blakers Ex. v. N. J. R. R. (1879), 30 N. J. Eq. 240, 18 Am. Law Rep. (N. S.) 562-569, n.; Gratiot, 116 Mo. 450, 21 S. W. 1094, 8 Am. R. R. & Corp. Rep. 352-376, ext. n., 16 L. R. A. 189; Guhl, 109 Wis. 69, 83 Am. St. 889-895; Paolino, 24 R. I. 432, 60 L. R. A. 133, n.; McDermott, 184 Mass. 126, 100 Am. St. 548, n. (children); 69 L. R. A. 300.

Suddenly putting one to election, in fright, his action is not contributory negligence on his part. Sweeney and Gibney cases; Cody, 151 Mass. 462, 2 Am. R. R. & Corp. Rep. 613, 7 L. R. A. 843; St. Louis R. R. v. Murray (1891), 55 Ark. 248, 29 Am. St. 32, 16 L. R. A. 787a, Hutch. Carr. 662, Suth. Dam. 39.

Mistaken judgment in case of sudden peril is not. Penna. Co., 48 O. St. 316, 38 N. E. 172, 4 Am. R. R. & Corp. Rep. 290, 36 Am. St. 847, 13 L. R. A. 190; Kleider v. People's R. R. (1891), 107 Mo. 240, 14 L. R. A. 613, n.

Jumping from moving train. Walker, 41 La. Ann. 795, 17 Am. St. 417-429, 7 L. R. A. 111. Volenti, etc.

SWIFT v. TYSON (1842), 16 Pet. (U. S.) 1, 14 Curt. 166, 10 L. ed. 865, 1 Am. Lead. Cas. 411, n., Bigl. Lead. Cas. N. & B. 186-212, n., McClain, Const. Cas. 186, 3 Kent, 85, n., 2 Rand. Com. Paper, 1 Danl., 1 Pars. N., 1 Pars. Conts. 277, 278, Wade, Notice, 80-84; Jones, Construc. 35; 3 Page, Conts. 1273 1295 1303, 1740; 49 L. R. A. 591; Goodman v. Harvey (1836), 4 Adol. & El. 870 (51 E. C. L. R.), 2 Wall. (U. S.) 119, Bro. Max. 718, 165 Pa. 199, 44 Am. St. 652, Huff. Nego. Insts.; Brown v. Spofford: 54; Reed v. Brown (1893), 89 Iowa, 454, 48 Am. St. 409, 15 Fed. Rep. 102, 18 L. R. A. 203; Bedell, 77 Cal. 572, 11 Am. St. 307-326, ext. n.; Griggs, 136 N. Y. 152, 32 Am. St. 704-731, ext. n., 18 L. R. A. 120; (collateral securities—consideration for); Coddington v. Bay (1822), 20 Johns. 637, 11 Am. Dec. 342, 14 Mont. 574, 43 Am. St. 661, 2 Pom. Eq. 749 (collateral security); Williams v. Stoll.

Cited, pp. 3, 36; §§ 20, 112, 147, 148, 150, 154, 184, 209, 307, 329, 331, Hughes' Proc.; §§ 151, 180, 272, 288, 289, 307, Gr. & Rud.

Swift.—

Swift stated: Commercial paper; its leading rule. A purchaser of commercial paper before it is overdue, in the ordinary course of trade, for a valuable consideration, without notice of facts that would impeach it in the hands of antecedent parties, is a *bona fide* holder, and may recover upon it.

Thamling, 14 Mont. 567, 43 Am. St. 658, n. 2 Gr. Ev. 172; Bassett: 395, 2 Lead. Eq. Cas. 1-109; Miller v. Race, ante; Bish. Conts. 664.

Gross negligence in buying negotiable paper will not defeat a bona fide purchaser. Farrell v. Lovett (1878), 68 Me. 326, 28 Am. Rep. 59, 1 Danl. Nego. Insts. 775; Cheever, 150 N. Y. 59, 55 Am. St. 646, n. 2 Beach, Conts. 1418. See PURCHASERS WITH NOTICE; Huff. Conts., Danl. Nego. Insts.; Merchants' Bk., 57 W. Va. 625, 70 L. R. A. 312; cases.

A pre-existing debt is a sufficient consideration to constitute one a bona fide purchaser of commercial paper. Swift; Reed, supra; Vadakin: 11; Depeau (general resume); Birket, 68 Kan. 295, 104 Am. St. 405, n.

Amount paid for note. Oppenheimer, 97 Tenn. 19, 56 Am. St. 779, n.

Forgery alone will defeat a bona fide purchaser. 1 Rand. Com. Paper, 230, n.; Woodhull v. Holmes (1813), 10 Johns. 231; Kulenkamp, 71 Mich. 675, 15 Am. St. 283, n. 1 L. R. A. 594; Williams v. Stoll; Ewart, Estop. 456-472. Or a statute declaring the note void. Swinney, 8 Wyo. 54, 80 Am. St. 916. See Union Trust Co. v. Preston (illegality and immorality insufficient).

If blanks are left in commercial paper, these may be filled by any holder. Angle. And if negligently left and these are filled out, this is not such a forgery as *ipso facto* vitiates the instrument. Young v. Grote.

Receiver of fruits of his fraud is liable over to injured party. Fenimore v. U. S. (1797), 3 Dall. (Pa.); Evans, 78 Mich. 145, 18 Am. St. 435, n. 6 L. R. A. 501, n. 86 Am. St. 712, n. (only innocent person is protected). One who sets a dangerous thing in motion is liable. Squib Case; Angle.

A consideration paid is essential to constitute a bona fide purchaser. Atlantic Mills, 147 Mass. 268, 9 Am. St. 698.

Innocent purchaser, when protected. Fitzsimmons: 384; Lickbarrow: 394; Union Trust Co.

Documents stolen or found. Ewart, Estop. 456. A thief securing commercial paper before its delivery cannot sell and constitute a *bona fide* purchaser. Salley, 95 Me. 553, 85 Am. St. 433, n. (negotiable instruments never delivered are unenforceable); Bank, 66 Kan. 595, 72 Pac. 207, 97 Am. St. 383 (a thief may give title to county warrants).

Rights of payee of note after repurchasing it from bona fide holder. Andrews, 111 Wis. 334, 54 L. R. A. 673, ext. n.

Rights of holder of commercial paper transferred after maturity. Y. M. C. A. Co. v. Rockford Bank (1899), 179 Ill. 599, 46 L. R. A. 753-814, ext. n.

One with notice gets rights of his transferor if not an antecedent party. Bell v. Twilight; Prentiss, 116 Wis. 647.

Circulation will give vitality where none before existed. Union Trust Co.; Union Collection Co., 150 Cal. 159, 119 Am. St. 164-181, ext. n. (declared void by statute).

Swift.—

Lickbarrow; 1 Wat. Tres. 49; Horn v. Cole; Mitchell v. Reed. See Master v. Miller; 1 Bates, Part. 90.

Commercial paper payable to bearer is analogous to a bank note; whoever is the holder has power to give title to any person honestly acquiring it. Swift; Bro. Max. 809.

Negligence in executing commercial paper and causing loss; this must be borne by him in fault or nearest to it. Allegans contraria, etc.; Horne. See Williams v. Stoll; Lickbarrow: 394; Angle.

Rights of parties when a forged check has been paid. People's Bank, 88 Tenn. 299, 17 Am. St. 884-899, ext. n.; 6 L. R. A. 724; Tobey.

Negotiability of instruments. A bill of exchange, payable to a particular person, without the words "or order," "or assigns," or other such words, is not negotiable.

Gerard v. La Coste (1787), 1 Dall. (Pa.) 194, 1 Am. L. C. 369-411, n. 3 Am. Dec. 226, 1 Rand. Com. Paper, 177, 2 id. 656, 3 Kent, 77.

Overton v. Tyler. See COMMERCIAL PAPER. Under the modern rule negotiability of all instruments is favored. See ASSIGNMENTS.

SYSTEM: One transaction, when admissible to prove another. P. v. Molleneux; Strong v. S.: 313a; 1 Wh. Ev. 30-45; 1 Gr. 53, 107-111; Res inter alios acta, etc.; cases. When admissible to show intent or motive. See Res inter alios. Defrese v. S.; Sykes v. S., 112 Tenn. 572, 105 Am. St. 972-1006, ext. n.; 12 Cyc. 406-412; Montgomery v. S. (excluding blacks from jury duty).

SYSTEMS OF LAW: See SUPREME LAW OF THE LAND; Martin: 246; DIVINE LAW; CHRISTIANITY.

TACITA QUÆDAM HABENTUR PRO expressis: Certain things, though unexpressed, are considered as expressed. 8 Coke, 40. *Expressio eorum, etc.*

TACKING: Marsh v. Lee (1671), 2 Vent. 337, 1 Chan. Cas. 162, 3 Ch. Rep. 62, 21 Eng. Rep. 1076, Wh. & T. Lead. Cas. Eq. 337-380, 2 Wash. R. P. 150; 2 Bouv. 1091, And. Dic.

TAINTOR V. FENDERCAST: L.C. 344. (Agency; undisclosed principal; parties. Thomson v. Davenport.)

TAKING AND CARRYING AWAY, IN robbery. McClain, C. L. 471-475. Must be continuous. McClain, C. L. 536, 537. How alleged in larceny. McClain, C. L. 607. §§ 271, 272, 278, 293, 294, Gr. & Rud.

TALIS INTERPRETATIO SEMPER fienda est, ut evitetur absurdum, et inconvenientis, et ne iudicium sit illusorium: Interpretation is always to be made in such a manner that what is absurd and inconvenient is to be avoided, and so that the judgment be not nugatory. 1 Coke, 52. See Quod est inconveniens; Ut res magis, etc.; ABSURDITIES; Semper præsumitur pro sententia; Russell v. Shurtleff, § 13, Hughes' Proc.

TANNER V. SMART: Sub LIMITATIONS.

TARBLE'S CASE: L.C. 247.

TARLING V. BAXTER: L.C. 404.

TARRY V. ASHTON: Landlord and tenant; which must repair. See Todd v. Flight.

TATE V. P. (1895), 6 Colo. App. 202.

Negative, pregnant denials bad. DENIALS.

TATLOCK V. HARRIS (1789), 3 Term Rep. (D. & E.) 174-180. Throop, Validity Verb. Agents; Ans. Conts.; Chit., Pars., Beach, Add., Bish., Laws.; cited, § 130, Hughes' Conts. See NOVATION.

TAXATION: Cooley, Burroughs, Desty, Judson, Welty (Assessments), Black, Blackwell (Tax Titles); 2 Bouv. Dic. 1093-1100; Brown, Jurisdic. § 200, Hughes' Proc.

MAXIMS, LEADING CASES, GENERAL PRINCIPLES: *The power to tax is the power to destroy* (McCulloch: 147; 195 U. S. 56; 201 U. S. 261).

Expressio unius (Proper constitutional officer must assess. P. v. Hastings: 144).

What ought to be of record must be proved by record and by the right record (Iverslie: 46; Moser: 125).

De non apparentibus, etc., *Consensus tollit errorem* (Fletcher v. Trewalla: 18).

De minimis non curat lex (what is a nullity and what a mere irregularity).

Debile fundamentum fallit opus (what defects are open to collateral attack).

Lawrence v. Fast; *Tilton v. R. R.*: 132, 133 (foundation of is a certain and right record); *P. v. Seymour*: 256; *Stout v. Mastin*: 124; *Tilton v. R. R.*: 133 (certainty essential for a valid tax); *Iverslie v. Spaulding*: 46 (record matter; the best evidence is indispensable); *Russell v. Mann*: 87; *Nixon v. Ruple*: 127; *Iverslie v. Spaulding* (a tax must be clearly demonstrated by proper record matter, and agreeably to the requirements of the conserving principles of procedure); *McCulloch v. Maryland*: 147 (states cannot tax federal agencies; *P. v. Seymour*: 256; *Allen v. Inhabitants of Jay* (limitations upon the power); *Loan Association v. Topeka* (must be for a public purpose); *Moser v. White*: 125 (there is no oral or parol levy of taxes). See *Piper v. Pearson* and *Nixon v. Ruple*: 114, 127; *Stetson v. Kempton*: 163 (illegal assessments are a trespass); *P. v. Seymour*: 256 (curative statutes may validate an irregular tax, when). See *De minimis*.

Due process of law and other conserving principles of procedure are involved in taxation. 210 U. S. 373.

See **DUE PROCESS OF LAW; MANDATORY RECORD; CONSTITUTIONAL LAW; COLLATERAL ATTACK; DIVISION OF STATE POWER; De minimis non curat lex; JURISDICTION; RECORD; CONSTRUCTIVE NOTICE; CERTAINTY; Quod ab initio, etc.; **WAIVER**; *Norwood v. Baker* (1899), 172 U. S. 269; *Barber Co.*, 158 Mo. 534, 54 L. R. A. 492, 181 U. S. 324, 45 L. ed. 879; *Winona Co. v. S.*; *Chicago v. R. R.* (1897), 166 U. S. 226. See *Turpin v. Lemon* (1902), 187 U. S. 51; *Audi alteram partem*, Max. No. 1; §§ 51-78, Hughes' Proc.; 201 U. S. 245.**

DUE PROCESS OF LAW; NOTICE. It is necessary to the validity of an assessment on real estate, other than general taxes, that somewhere along the line of proceedings notice be given to the owner and an opportunity afforded him to be heard in opposition or defense. *Chicago R. R.*, 67 Ohio, 279, 60 L. R. A. 525, n.: cases; *Fayerweather*, sub *Res adjudicata*; 196 U. S. 276; *Audi alteram partem*; *Chase v. Hathaway*; 210 U. S. 373.

Procedure and taxation are intimately united, as is discoverable from the foregoing maxims and cases. The conserving principles of procedure are greatly involved. The principles of taxation are correlated with these policies and should be comprehended therewith.

See *Tilton*: 133; *Russell*: 87; *Nixon*: 127; *Iverslie*: 46: cases; *Walker*: 118: cases.

Taxation.—

The record to support a tax may be coram non jure, as in judicial proceedings. Likewise it may be subject to collateral attack. Purchasers under taxation and judicial proceedings are alike charged with constructive notice. *Caveat emptor.*

The tests of a record to support a tax are very analogous to those testing a judicial record to support a plea of res adjudicata.

Records must exist and be sufficient to support the technical requirements of the conserving principles of procedure. See §§ 83-123, Gr. & Rud. The requirements of a record to support a tax are not more technical and refined.

Taxation is a strict statutory right, contrary to the course of the common law. It is viewed as are all other statutory rights or exercise of power, such as govern statutory and inferior tribunals, service by publication and the exercise of eminent domain.

Piper: 114 (inferior and statutory tribunals); *Hart*, 159 Ind. 182, 95 Am. St. 280; *Suth. Stat.* 454 (mandatory statutes); *Crepps*: 113: cases (inferior and statutory tribunals); *Galpin*: 63: cases (service by publication). § 13: cases, Hughes' Proc.

Assessor must have jurisdiction. *Harrington*, 179 Mass. 486, 94 Am. St. 613, n.

Assessments must be made at the right time. *Drew*, *Thames*, *Westfall* and *Wirthington* cases; *Fletcher*: 18. See **TERMS OF COURT; De minimis non curat lex** (illustrations).

Taxation proceedings are not aided by waiver, judicial notice, presumptions of regularity and liberal construction, any more than are judicial proceedings. An authority must appear from the right record. Strict compliance with law, involving the division of state power and notice, must be observed and properly evinced. § 259, Hughes' Proc.; *Piper*: 114; *Iverslie*: 46: cases.

Taxation records are strictly construed, as is the statutory record, which has no presumptions in its favor. § 239, Hughes' Proc.

Hake v. Struble (statutory record); *Tilton* and *Iverslie* cases (taxation).

Records of every description, divesting one of life, liberty or property, are strictly construed. Every presumption against the pleader or the claimant thereunder, is the rule. *Verba fortius; Ambigua responsio*, etc.; *Bro. Max.* 4, 180, 182, 601, 602, 715 (8th ed.); *De non apparentibus*.

U. S. v. Cruikshank: 232 (indictment); *Rushton v. Aspinall*: 5 (declaration); *Harvey v. Brydges* (plea); *Garland*: 60; *Sto. Pl.* 10 (pleadings in equity); *Tilton*: 133; *Lawrence*: 132 (assessment rolls). § 13, Hughes' Proc.

Taxation.—

No assessment roll, no tax. Tilton Case: 133; Stout: 124; 2 Desty, Tax., §§ 114-118. *The idea is just the same when there is no indictment.* R. v. Wheatley: 19. *Or record proper.* Rushton: 5; Piper: 114; Moser: 125. *Presumed against.* Russell: 87; Marx: 126; Bro. Max: 4.

Judgments and taxation; each depends on a record. Moser: 125; Tilton: 133. See RECORD; PROCEDURE.

Pleading and proving of; strict rules. Russell: 87; *De non apparentibus*, etc.; Max: No. 2; §§ 78, 85, Hughes' Proc.; Iversile: 46.

Taxation proceedings are pleaded and proved under very strict rules, as are res adjudicata and justification defenses. An authority must be pleaded is the rule. Hopper: 4.

Occupation tax; constitutional limitations. Price v. P. (1901), 193 Ill. 114, 86 Am. St. 306.

Cars devoted to interstate commerce are taxable in states where found. Refrigerator, 177 U. S. 149, 18 Utah, 378, 48 L. R. A. 490, n. *Taxation is a proceeding in rem.*

Inheritance taxes. Knowlton, 178 U. S. 41.

Situs of property; where it may be assessed; jurisdiction. Buck, 147 Ind. 586, 62 Am. St. 436-477, ext. n.; Bristol, 177 U. S. 133: cases.

Must be uniform. School District, 60 Neb. 147, 83 Am. St. 525, n.

Corporate taxation and the commerce clause. Sanford, 16 C. C. A. 305, 37 U. S. App. 378, 69 Fed. 546, 60 L. R. A. 641-698, ext. n. *Drainage; assessments for.* See EMINENT DOMAIN; 58 L. R. A. 353-385, ext. n.

Taxation of capital stock of corporations. State Board, 191 Ill. 528, 58 L. R. A. 513-618, ext. n.

Of corporate franchises. Louisville Tobacco, 106 Ky. 165, 57 L. R. A. 108, ext. n.

Of decedent's estates. Morrill (1901), 95 Me. 165, 56 L. R. A. 634, ext. n.

Corporate taxation in the United States as affected by the contract clause in the federal constitution. Adams, 77 Miss. 194, 60 L. R. A. 33-116, ext. n.

Constitutional equality in the United States in relation to corporate taxation. Bacon, 126 Mich. 22, 60 L. R. A. 321-376, ext. n.

TAX DEEDS: Nature and effect of. 2 Bouv. Dic. 1099; Cool. Tax. 2d ed.; Blackwell, Black, Tax Titles. Effect of, as evidence. S. v. Thomas: 257.

Who may purchase and enforce. Cone, 108 Iowa, 260, 75 Am. St. 223-253.

Recitals in. Jackson v. Cleveland: cases.

TAXPAYERS' REMEDIES: See VOLUNTARY PAYMENT. § 314, Hughes' Proc.

Injunction to restrain a tax. Dows, 11 Wall. 108, 20 L. ed. 65, n. (injunctions to restrain collection); Brown, Jurisdic.; Ogden, 168 U. S. 224, 42 L. ed. 444, ext. n.; Insurance Co., 24 Colo. 220. *An equity must appear for.* Pittsburgh Ry., 172 U. S. 32: cases (assessment found valid); Pollock, 157 U. S. 429-624; on rehearing, 158 id. 601-715 (injunction to prevent a diversion of trust funds; no stare decisis against a constitution).

Remedy against illegal appropriation of public funds. McCord, 121 Ill. 288, 2 Am. St. 86-106, ext. n., 2 Beach, Pub. Corp. 1622-1643; Loan Ass'n; Thorndike, 82 Me. 39, 7 L. R. A. 463: cases; S. v. Osawkee Tp. (1875), 14 Kan. 418, 19 Am. Rep. 99; Feldman, 23 S. C. 57, 55 Am. Rep. 6; Kingman, 153 Mass. 255: cases; 11 L. R. A. 123; 4 Am. R. R. & Corp. Rep. 132; New London, 22 Conn. 552; Hodges, 2 Denio, 110; Tash, 10

Taxpayers' Remedies.—

Cush. 252; Inge, 135 Ala. 187, 96 Am. St. 20-30, n.

Moneys paid out ultra vires by public officers recoverable. Chaska, 53 Minn. 525, 2 Beach, Confs. 1167.

Collecting a tax: Statutory remedy must be followed. Richards v. County Commissioners (1894), 40 Neb. 45, 42 Am. St. 550-561, ext. n., 2 Dill. Corp. 815; Russell v. Mann; P. v. Seymour (1860), 16 Cal. 332, 76 Am. Dec. 521, n. (L.C. 256); Nevada, 14 Nev. 220, 249: cases (a tax is not a debt express or implied); Hanson County, 12 S. Dak. 124, 76 Am. St. 591, n. As to Richards Case, see 42 La. Ann. 1145, 11 L. R. A. 817, n.; S. v. Ga. Co. (1898), 112 N. C. 34, 19 L. R. A. 485-487: cases.

A collector is liable for an illegal tax collected by him. Stewart, 93 Ga. 12, 44 Am. St. 119, n., 1 Dill. Corp. 238; Stetson: 163. *Equal and uniform law protects citizen in taxation.* See Nashville R. R. Case, sub CIVIL RIGHTS.

State may provide a new remedy to collect. League, 184 U. S. 157 (such a statute is not obnoxious to the 14th Amendment, Const. United States. Therefore, where one had nothing, and still he was assessed, but he paid no attention to it because the remedy was in rem only, the legislature can afterward make it an in personam liability, and upon this tie a millstone to his neck. We mention this to show how adjective law reacts on substantive rights. See REMEDIAL STATUTE; Terre Haute R. R. § 151, Gr. & Rud.

Taxpayers may restrain an illegal tax. Taxpayers', sub Keech; Hart, 159 Ind. 182, 95 Am. St. 280.

Assumpsit to recover moneys paid for illegal taxes. St. Anthony Co., 9 N. D. 346, 50 L. R. A. 262, n. See MONEY HAD AND RECEIVED.

Taxing officers liable for acting out of jurisdiction. Stetson: 163, sub Squib Case; Lange: 159.

TAYLOR v. MERCHANTS' INS. CO.: L.C. 329.

TAYLOR v. BROWN (1854), 4 Cal. 188, 60 Am. Dec. 604. *Constables may appoint deputies without express authority.* 7 Bac. Abr. 317; Bro. Max. 841; Jobson, 35 Cal. 711. See 1 Am. & Eng. Encyc. Law, 744, Mech. Pub. Off. 569. *The judicial function cannot be delegated.* Van Slyke: 177.

TAYLOR v. CALDWELL: L.C. 310.

TAYLOR v. CASTLE (1871), 42 Cal. 367, Blanch. & W. L. C. Mines, etc., 521, 11 Mor. Min. Rep. 484; Rossman, 80 Minn. 160, 81 Am. St. 247, n. § 137, Hughes' Proc.

Identity of issues, how proved. Sub RES ADJUDICATA; Gardner; Mondel: 77; Bro. Max. 339, 348.

Mining partnerships; law of. Taylor; Skillman, 23 Cal. 198, 83 Am. Dec. 96-111, n.; Childers (1899), 47 W. Va. 70, 81 Am. St. 777, n.

TAYLOR v. COLE (1780), 3 Term R. (D. & E.) 292, 1 H. Bl. 555, 1 R. R. 706; Mews' E. C. L., 1 Sm. Lead. Cas. 1347-1359, 8th ed. §§ 67, 296, Gr. & Rud.

Owner of real estate cannot take possession of it by violence. Salus populi. But he may peaceably. Harvey v. Brydges. See Hannabalsen, 116 Ia. 457, 93 Am. St. 250-261, ext. n. (expulsion of trespasser). Slek child of tenant, if injured, may recover. Bradshaw, 113 Ia. 579, 55 L. R. A. 258, n.

TAYLOR v. PORTER: L.C. 219a.

TAYLOR v. SPINWILLE (1819), Breeze (Ill.), 1. This, the first case of a great state, involved the *Rushton*, *J'Anson* and *Wheatley* cases. It may be cited against the power of a legislature arbitrarily to prescribe that a conclusion of law constitutes a good pleading. *Lex non exacte*. The *Wheatley* case was set out in *Wright v. P.*, Breeze, 102. See **POLICE POWER; THEORY**; Indianapolis: 223.
Cited, §§ 13, 23, 28, Hughes' Proc.; § 137, Gr. & Rud.

TAYLOR & ATKINS v. HORDE (Taylor v. Horde), (1757), 1 Burr. 60, 2 Smith, Lead. Cas. 583-727, ext. n., 8th ed., 575-723, 11th ed. (reviewing English cases), 3 Gray, Cas. Prop. 47, Mews, E. C. L. 4 Kent, 446, 483-487, Ang. Waterc. 221, Tyl. Eject. 77, 80, 83, 855, Sedgk. & Wait, Tri. Tit. to Land, 1 Tay. Ev. 127, 2 Whart.; 3 Wash. R. P. See **LIMITATION OF ACTIONS**.

Cited, § 328, Hughes' Proc.

Limitation of actions relating to real estate; adverse possessions. Nepean v. Doe.

Adverse possession; essentials of. Louisville R. R., 82 Miss. 180, 100 Am. St. 626, n.; Johnson, 38 Conn. 513, 12 Am. Law Reg. 271-276, n., Tyl. Eject. 851-947, Sedgk. & Wait, Tri. Tit. 724-753. Intention as an element under a claim of right. Sedgk. & Wait, Tri. Tit. 754-760.

Color of title; what is; effect of. Sedgk. & W. Tri. Tit. 761-781, Tyl. Eject.; Tate, 3 Hawks (N. C.), 119, 14 Am. Dec. 578-584, n.; Lebanon Min. Co., 9 Colo. 34. Void deed; possession under, is color of title. 9 L. R. A. 774-776. See Walker: 118.

TEACHER: Chastisement by; when lawful. Stephens; McClain, C. L. 242, 348.

TECHNICALITIES: Are the safeguards of the law, as will appear from views afforded in the discussions of estoppel and collateral attack. See **FORMS OF THE LAW; MANDATORY RECORD; Hoskins v. P.: 80; Sperry v. C.; Windsor: 1; S. v. Baughman: 268; *De minimis non curat lex*; also **TERMS OF COURT**; Stubbings: 49 (a *placitum* essential to show *coram iudice* proceedings); §§ 204, 227, Hughes' Proc.**

Distinctions between contracts—the judgment and simple contract—are but technical distinctions, chiefly involving technical rules of procedure. Tex. R. R. v. Humble.

What is not juridically presented cannot be judicially considered, is a rule that involves many technicalities. Illustrations of these will appear from *Planing Mill Co. v. Chicago*: 2d, and *Crain v. U. S.*

Allegations that belong to the statement cannot be made in the caption. *Jackson v. Ashton* (U. S.). Exhibits appended to a pleading are no part thereof. *Pearson v. Lee*, 1 Scam. 193 (an exhibit improperly appended to a pleading is no part thereof); it cannot be seen with legal eyes; it cannot be judicially considered.

The distinctions between domestic, sister state, foreign judgments and those of inferior and statutory tribunals involve technicalities of the law that should be well understood. See *Omnia presumuntur rite*.

There are technical requirements upon which depend the mandatory requirements of a constitutionalism; these are important. They are not *De minimis non curat lex*. They cannot be waived. The general de-

Technicalities.—

murrer has many accessories and dependant rules that are technicalities, but these are not trifles. The general demurrer is a probe and a test of a record for its sufficiency to support the conserving principles of procedure. For this reason the grounds of the general demurrer cannot be waived. U. S. v. Cruikshank: 232. See **THEORY OF THE CASE**; *Great N. R. R. v. S.*, 208 U. S. 452 (a ground of the general demurrer can be waived).

Technicalities are to be respected when they are the safeguards of the law; of such are those that relate to *De non apparentibus, Frustra probatur* and *Verba fortius*. Upon these depend the mandatory requirements of a constitutionalism. §§ 56-61, Gr. & Rud. These cannot be abolished. *Melius*.

Technicalities are indispensable in the operations of a constitutionalism. Only in an absolutism can technicalities be excluded; when the division of state power is established then a constitutionalism is created and with it technicalities begin; the division of state power depends upon a network of technicalities which result from necessity; and when we say necessity we mean a ground and rudiment of law. Necessity has been classed as the fourth ground and rudiment of law. § 51, Gr. & Rud. What necessity compels, the law—reason—must permit.

In contract law are many technicalities relating to all its elements, and especially the assent (*Non hæc in fœdera veni*) and the consideration (*Ex nudo pacto non oritur actio*).

TECHNICS: Bliss, C. Pl. 7. Tiede, Pol. Power, 68.

TELEFSEN v. FEE: sub, Savacool: 164.

TELEGRAMS: Contracts by. Cobb, 57 W. Va. 49, 110 Am. St. 734-777, ext. n. Whart. Contrs. 27; Adams v. Lindsell: 326. *Telegraph*. 2 Bouv. 1100-1105, And. Dic. *Telegraph companies*. Non-delivery of telegram; one liable for. Fisher v. W. Co. (1903), 119 Wis. 146 (Citing Hadley); Karby v. W. U. 37 Ind. Ap. 73, 117 Am. St. 278-323, ext. n.

Actions against. 3 Suth. Dam. 957-982. See sub *Victorian R. R.*; Mech. Cas. Dam. 506-559.

TELEPHONE: And. Dic. 1013-1016. See **TELEGRAMS**. Duties of to deliver messages. Tel. Co. v. Brown (1900), 104 Tenn. 56, 78 Am. St. 906, n.

TEMPEST v. FITZGERALD: L.C. 408.

TEMPUS ENIM MODUS TOLLENDI obligationes et actiones, quia tempus currit contra desides et sui juris contemptores: For time is a means of destroying obligations and actions, because time runs against the slothful and contemners of their own rights. *Fleta*, 1, 4, c. 5, § 12. *Vigilantibus*, etc.

TENANT: LANDLORD AND TENANT. Who must repair dangerous premises. Todd.

TENDER: What it admits. Finch; 2 Gr. Ev. 600-611a; 1 id. 204; Supply Ditch; Bliss, Pl. 364; 11 Cyc. 71-81.

A plea of tender admits that amount due. Ansley; Supply Ditch.

Tender of amount due discharges lien. Kortright; Hauswirth: 51.

Generally: 2 Gr. Ev. 600-611a, 1 Suth. Dam. 260-278, 1 Beach, Conts. 297-340; 2 Bouv. 1007-1107; And. Dic. 1018; Hunt, Tender; 3 Page, Conts. 1413-1430. Objections to, on one ground waive all others. 2 Gr. Ev. 600; *Allegans*.

TENDERER'S ACT: See STATUTE OF FRAUDS; 2 Bouv. Dic.

TERMINOLOGY: *Ignoratis terminis, ignoratur et ars.* Essential for finding the law. See FINDING THE LAW.

TERMS OF COURT: Strict provisions for the convening and holding of courts and of assessing powers are provided for in Magna Charta. See Blair: 170; Nixon: 127; 11 Cyc. 726-1138. §§ 126, 157, 168, Gr. & Rud.

Place of sitting must be known, and judgments are void if entered elsewhere. Hillson, 107 Ga. 230, 73 Am. St. 119, n.; Brown, Jurisdic. 1, 2.

Courts must convene and adjourn as provided for. Blair: 170; Freem. Judg. 121; Roy: 288, 6 Oreg. 382, 25 Am. Rep. 537-541, ext. n.; Van Fleet, Coll. Att. 30-33; Terrill, 52 Kan. 29, 39 Am. St. 327, n. Judgments out of time are *coram non judice*. Piper: 114.

Judgment rendered in vacation is void. Ellis (1897), 37 Tex. Cr. Rep. 539, 66 Am. St. 831. Term may be extended by order of court *ex necessitate* to dispose of a trial pending. Sutherland v. S. (1897), 150 Ind. 154, 155-157. *Statutory record—exceptions record—may be signed in vacation.* Hake. Judges at chambers; powers of. Blair: 170. Assessing for taxation must be at right time and place. Drew.

TERRA MARENS VACUA OCCUPANTI conceditur: Land lying unoccupied is given to the first occupant. 1 Sid. 347. See POSSESSION; *Qui prior est tempore.*

TERRA TRANSIT CUM ONERE: Land passes with the incumbrances. Co. Litt. 231; Bro. Max. Accessorium, etc.

TERRE HAUTE R. E. v. INDIANA (1904), 194 U. S. 579 (a remedial statute declared unconstitutional). See CONSTITUTIONAL LAW. §§ 151, 268, Gr. & Rud.

TERRY v. ANDERSON: L. C. 240.

TERRY v. HUTCHINSON (1868), 9 B. & S. 487, L. R. 3 Q. B. 599. Moak, Torts, 341. Cool. 272. Bish. 378, 379, 2 Add. 1275, Bigl. L. C. 291, 294; Lawyer, 130 N. Y. 239, 27 Am. St. 527, 14 L. R. A. 700, n., 9 Mews' E. C. L. 918, 920, 5 Jac. Fish. 6451, 6454; 4 Suth. Dam. 1281, 1 Wh. Ev. 51, 1 Sedgk. Dam. 472; White v. Murtland (1874), 71 Ill. 250, 22 Am. Rep. 100, And. Steph. Pl. 82; Lumley v. Gye. *Seduction; doctrines; damages. Seduction of daughter under twenty-one, actionable.* Martin v. Payne (1812), 9 Johns. 387, Bigl. L. C. Torts, 305, ext. n., 6 Am. Dec. 288, 2 Gr. Ev., Cool. Torts, Bish. Torts; Borden: 267; Anthony, 60 Kan. 341, 44 L. R. A. 757.

Terry is much like Martin. Here, too, the daughter was nineteen, but had quitted her employer and was on her way home, when she was seduced, in a railway car. Otherwise the cases are similar. Winsmore, Bigl. L. C. Torts (enticing wife away); Lynch.

The action for seduction is not maintainable upon relation of parent and child, but solely upon that of master and servant. White v. Nellis (1865), 31 N. Y.

Terry v. Hutchinson.—

405, 88 Am. Dec. 282, n.; Moak, Underh. Torts, 340; Lawyer, *supra*. Direct injury to rights must be shown; i. e., more than mere seduction. White v. Nellis, *supra*. Venereal disease, if imparted and physically disabling, is ground for recovery. White v. Nellis, n. Death from, non-actionable. Terry; *Actio personatis*; Hood: 141 (adult woman may sue for, if seduced by fraud; promise to marry is a fraud). General reputation of female. White v. Murtland, *supra*. Parents' misconduct may defeat the action, as when they invite profligate acquaintances or society of married men. Riddle v. Scoot (1795), 1 Peake (Eng.), 316; Moak, Torts, 345; *Volenti non fit injuria*.

Generally: 2 Gr. Ev. 571-579, 2 Sedgk. Dam. 468-480, 4 Suth. Dam. §§ 1281-1285; 2 Add. Torts, 1281-1287; 21 Cyc. 1620-1623 (crim. con.). As a crime, McClain, C. L.; Bish. Stat. Crimes, 625-655; Moak, Torts, 326-349, 5 Crim. Def. 775-782. Promise to marry in case of pregnancy is no defense. S. v. Hughes (1898), 106 Iowa, 125, 68 Am. St. 288.

TERRY v. MURGER (1890), 24 N. E. 272, 121 N. Y. 161, 18 Am. St. 803-810, 8 L. R. A. 217, Bliss, Code Pl. 11; S. P. Smith v. Hodson (election of remedies): cited in Terry, Kingston's Case: 76 and Jones v. Hoar, 1 Page, Conts. 840. § 181, Hughes' Proc.

An election is final and conclusive. One seeking redress from one of two courts with concurrent jurisdiction is bound by the election he makes. Field, 6 N. Dak. 424, 66 Am. St. 711, Ell. App. Proc. 149. Record admissions to prove the election without pleading an estoppel. See Bailey: 44.

TESTIBUS DEPONENTIBUS IN PARI numero dignioribus est credendum: When the number of witnesses is equal on both sides, the more worthy are to be believed. 4th Inst. 279. Witnesses are weighed, not counted. Bonnell: 185. *Testimonia ponderanda*, etc.

Testimonia ponderanda sunt, non numeranda: Proofs are to be weighed, not numbered. Trayner, Max. 585. See CREDIBILITY OF WITNESSES; Bonnell: 185.

Testis nemo in sua causa esse potest: No one can be a witness in his own cause. Otherwise in England, by Stat. 14 & 15 Vict. 99; and many of the states of the U. S. See 1 Gr. Ev.; COMPETENCY OF WITNESSES.

Testis oculatus unus plus valet quam auritis decem: One eye-witness is worth ten ear-witnesses. 4th Inst. 279.

Testimonia ne poent testifié le negative, mes l'affirmative: Witnesses cannot witness to a negative, they must witness to an affirmative. 4th Inst. 279. Affirmative testimony outweighs negative. See Bonnell: 185.

TESTIMONY OF WITNESSES, DEAD, absent, or subsequently disqualified. 1 Gr. Ev. 163-168. Testimony of absent witnesses taken at a former trial is admissible. Atchison R. R., 64 Kan. 187, 91 Am. St. 199-208, ext. n.

Criminal cases. See PRISONERS; Clyde Mattox Case: 153; *Contra cases.*

TESTIS DE VBU PRAEPONDERAT alii: An eye witness outweighs others. 4th Inst. 470.

TEXAS: Adopts all those rules of certainty which serve the conserving principle of protection. Cromwell: 26; Huntsman: 231; Horan: 85. Its cases quite uniformly respect the mandatory record and the maxims upon which this depends.

Texas.

The great cases of *Rushton*: 5 and *Bris-tow*: 135 are quite uniformly upheld. See Galloway, 56 S. W. 238; also Weems; CONCLUSIONS OF LAW. See Towne, Elements of Law (Texas.)

TEXAS & PACIFIC R. R. v. HUMBLE (1900), 181 U. S. 57, 45 L. ed. 747, 21 Sup. Ct. Rep. 526. Cited, §§ 5a, 20, 156, Hughes' Proc.; § 197, Gr. & Rud.

Husband and wife as parties to suits; local statutes must be considered. Since the emancipation of women the maxim *Cessante ratione legis cessat ipsa lex* is applied. And there results a striking illustration of how a change of substantive law reacts upon and changes "adjective law." To explain how these act and react on each other, attention is called to this case:

The husband and wife had long been domiciled in Arkansas. Here the wife could sue as a *feme sole*. The husband had just left and domiciled himself in Louisiana, where they must be joined as parties, as at common law. On a train, while yet in Arkansas, to join her husband in Louisiana, she was injured, and sued the railway for damages. Under the facts, it was insisted the husband was a necessary party, because he could sue for personal injuries done the wife, also because his domicile was hers, and therefore he could sue in Louisiana and recover there. The answer to these positions was, that it was assumed the Louisiana courts would recognize the binding force of the judgment in Arkansas. The railway vainly insisted they were entitled to a hearing that could be pleaded as *res adjudicata* to a suit brought by the husband. *Humble, supra*.

Substantive rights and procedure (adjective law) act and react upon each other, expanding and contracting as public policy and other considerations appear and are weighed. Marriot. At this epoch of writing and teaching the law such cases should be made prominent, for they illustrate how the law is an entirety, an indivisible and non-partitionable whole. P. vi, Preface, Bish. New Crim. Law. See ADJECTIVE; ENTIRETY.

The views expressed here find eminent authority. See 25 Vol. Am. Bar Ass'n Rep., p. 554. "A Defect in Legal Education," pp. 545-558. "The intimate, and, indeed, vital relation existing between substantive and adjective law in early times is now universally recognized." P. 545. See ADJECTIVE LAW; SUBSTANTIVE LAW. "The rock upon which the whole fabric of the law, as a harmonious structure, is in danger of going to pieces is the lack of real knowledge on the part of the practitioners of procedure." Pages 549, 550 (Professor Redfield).

"Procedure lies at the base of contract and tort. Both these branches were largely developed by pleading. While this is difficult and abstruse, still the beginner must master it before he can thoroughly understand the law of contract and tort." P. 747 (Professor Beale).

The view that procedure lies at the base of protection and of contract, tort and

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crime was the old one. Its denouncement in later times has shown a marked influence upon writing and teaching the law, and this is now freely confessed by prominent teachers. 25 Am. Bar Ass'n Rep., pp. 545, 549 ("A Defect in Legal Education," by Professor Henry S. Redfield, of Columbia College); also at p. 749 (letter of Professor Charles H. Beale, Jr.). See §§ 27, 28, Hughes' Conts; Bates: 225.

The three species of contract—the judgment, the deed and the simple contract—are separated by what relates to procedure only. The judgment into which the contract or the lower right merged is a higher contract resulting from the operations and the effects of procedure. The deed is not above the simple contract, if it is denied its exclusiveness and conclusiveness in procedure. See INTRODUCTION; PREFACE, Hughes' Conts.

Give to the simple contract the attributes of procedure which belong to the higher species of contracts—the judgment and the deed—and it is equal to them. Accordingly appear the important distinctions between contracts—distinctions of procedure. How to plead and prove a right is more than "adjective law"; it is a part of "substantive law." Procedure is an incident, upon which much depends. It cannot be changed without affecting the "substantive law." 25 Am. Bar Ass'n Rep. (1902), p. 545.

Wherever husband and wife are one, there the husband has rights equal to or paramount to the wife, and therefore he must join or be joined with her in all litigation. Reason is the soul of the law.

But where common-law marital interests are changed by statute, this also changes the procedure. *Cessante ratione*.

The intimacy of procedure and of contracts appears in an explication of *Ex nudo pacto non oritur actio*; for this maxim means that unless one parts with something—an adequate consideration—he is never a *wronged* person, and therefore he never can truly complain or appear as such; on this account no court created for *wronged* persons will ever entertain his complaint. *Fabula*; Cumber: 311; § 5, Hughes' Proc. See SUPREME LAWS OF THE LAND.

The endless discussions around the right of one person to contract with another for the benefit of a third, and to enable the latter to sue without joining the party from whom the consideration moved, involves the question of who is the *wronged* party—the real party in interest,—and who may appear and complain of the defendant's deliction. See CAUSE OF ACTION; *Fabula*; PARTIES; *Ex nudo*, etc. Explanation in this light shows how contracts act upon procedure and also how it reacts upon contracts. Wherever the words *non oritur actio* are used, we have the question: What is the cause of action? This is always a question of procedure. See Weltmer: 268a.

Conceding the foregoing views to be

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well founded, and this further one also: That procedure should be developed for protection, and for this be certain and definite, and that therefore a cause of action must appear, and at the right time and place—in the right record—conceding all this, what must necessarily be the consequences upon procedure and its affine subjects when the foundations of a judgment are unknown—where they may be of either the mandatory record or the statutory record, or oralities?

In connection with the foregoing views should be considered Hahl (effect of procedure on substantive right); Marriot, same as Hahl.

Right to trial by jury is adjective law. Dove v. U. S., 195 U. S. 138 (Harlan dissenting).

The policy of the federal government is reflected from the allegations of an indictment. Its judicial power acts upon these allegations, and nothing else. Cruikshank: 232; Hodges v. U. S., 203 U. S. 1 (denies the substantive right conceded in Cruikshank: 232); Bates: 225. Consequently allegations must appear. They cannot be waived. Cruikshank: 232; Thomas v. Board: 10a.

See ADJECTIVE LAW; SUBSTANTIVE LAW; ELECTION OF REMEDIES; EQUITY; JUDGMENTS; JURISDICTION; Res adjudicata; LITERATURE; MAXIMS; PLEADINGS; NEGLIGENCE; CONSIDERATION; POLICE POWER; CONTINUITY; Cooch; Beaumont: 367; Hegarty (moral laws affect procedure); Seabury; Weltmer: 268a; White v. Bluett: 317; S. v. Baughman: 268; Chesterfield; Grain; Gradwohl; Bendoragie, sub Res adjudicata; CHAMPERTY; MAINTENANCE; BARRATRY; FORGERY; CONSPIRACY; COMPOUNDING OFFENSES; Lester: 341.

Elsewhere are observed the consequences of an erroneous definition. See THEORY OF THE CASE; *Ut res magis valeat*, etc. Also of misconceptions relating to the position and influence of equity jurisprudence on the law. See EQUITY; MAXIMS; LITERATURE; §§ 13-18, Hughes' Proc. The discussions relating to adjective and substantive law show great diversity of views. With much reason many contend that the law cannot be so partitioned and thoroughly taught.

TEXIRA v. EVANS: Hibblewhite.
THALLHEIMER v. BRINCKHOFF: MAINTENANCE.

THAMES MFG. CO. v. LATHROP (1829), 7 Conn. 550. Stated, Cool. Tax. Assessments must be made within time specified. Westfall: Blair: 170; Fletcher.

THATCHER v. POWELL: L.C. 117.

THEATER: 2 Bouv. Dic. 1114; Harney v. Nixon, 213 Pa. 20, 110 Am. St. 520-537, ext. n.

THE FUND WHICH HAS RECEIVED the benefit should make the satisfaction. 4 Bouv. Inst. n. 3730. *Qui sentit*.

THELLUSSON v. WOODFORD, also sub nom. Woodford v. Thellusson (1798), Hou. L. (1805), 4 Vesey, 227, 11 id. 112, 31 Eng. Reprint, 117, 8 R. R. 104, 1 Rul. Cas. 498-514, n., 6 Gray, Cas. Prop. 562, 4 Kent, 264, 284, 510, 2 Wash. R. P. 682, 730, Bro. Max. 453, Gray, Perpetuities; 1 Per. Trusts, 379, 394, 2 id. 737, Adams, Eq. 186; Southampton Lad v. (Marquis of) Hertford (1819), 2 V. & B. 54, 35 Eng. Reprint, 239, 1 Rul. Cas. 514-520.

Thellusson.—

Accumulation; executory devises. In *Thellusson* it was the declared doctrine that there was no limited number of lives for the purpose of postponing the vesting of an executory interest. There might be an indefinite number of concurrent lives in no way connected with the enjoyment of the estate; for be there ever so many, there must be a survivor, and the limitation is only for the length of that life. 4 Kent, 284.

Perpetuities; statutes against. Cross, 131 N. Y. 330, 27 Am. St. 597-611, n., 15 L. R. A. 606; Barnum, 26 Md. 119, 90 Am. Dec. 88-106, ext. n.; Walkerly, 108 Cal. 627, 49 Am. St. 97-138, ext. n. (perpetuities are disfavored) Greenh. Pub. Pol. 604.

Effect on prior estates when invalid under statutes. Saxton, 83 Wis. 617, 20 L. R. A. 509-520, n. Severability of perpetuities and forbidden trusts. Johnston, 185 Pa. 179, 64 Am. St. 621-646, ext. n.

THEORY OF THE CASE: See **VARIANCE**; *Verba fortius accipiuntur contra preferentem*; *Frustra probatur quod probatum non relevat*; *De non apparentibus et non existentibus eadem est ratio*.

Cited and discussed in §§ 60, 61, 108, 118, 119, 124, 127, 136, 147, 154, 164, 175, 177, 187, 233, 235, 238, 278, Vol. I Gr. & Rud.

It is a mischievous generality and often misleads like alder by verdict. §§ 118, 119, 230, 236, 238, Gr. & Rud. Rushton: 5; Dovaston: 217. See **WAIVER**.

§ 1. **Scope and purpose of this argument:** It is the purpose to show that the theory of the case as advocated by Judge Seymour D. Thompson and as countenanced by other prominent writers is opposed to necessary and logical deductions to be drawn from the purpose of allegations, of admissions upon a record, of denials, of the issue and of the uses and purposes of the mandatory record. Reinforcing these observations are found views from *res adjudicata* and collateral attack (§§ 171-262, Gr. & Rud.), also from Variance, Waiver and *Verba fortius*.

§ 2. **A court will not presume one has a better or a different case than what he states at the right time, in the right way, in the right record.** "What ought to be of record must be proved by record and by the right record." Phases of this organic rule appear in relation to Abatement; Appellate Procedure; Aylesworth; Benton; Bills of Exception; Cause of Action; *Caveat emptor*; Certainty; Codes; Conserving Principles; Construction; Denial; Demurrer; *De non apparentibus*; Estoppel; Evidence; Harrow; *Ignorantia legis*; *In presentia*; Jackson v. Ashton; Judgment; Jurisdiction. See also, **INDICTMENT**; **ILLINOIS**; **MISSOURI**; *Omnia presumuntur rite* (Harrow v. Grogan).

One must allege in order to give a court jurisdiction. Sache; Haddock;

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Campbell: 2; Munday: 79. And one must accordingly prove. *Actore non probante reus absolvitur*. See ALLEGATIONS; BURDEN OF PROOF. The foregoing is widely discussed and presented but possibly less concrete, technical and accurate. Accordingly we quote:

"Pleadings and a distinct issue are essential in every system of jurisprudence, and there can be no orderly administration of justice without them. If a party can allege one cause of action and then recover on another, his complaint will serve no useful purpose but rather to ensnare and mislead his adversary. *Romeyn v. Sickles*, 108 N. Y. 650; *Kewaunee Co. v. 29*; 2 And. Am. Law, 646, 647." See PLEADINGS.

"Primary rule of procedure. Parties must proceed upon a definite theory of action or defense and must adhere to the one first chosen until allowed by the court to change under the rules of amendment." 2 And. Am. Law, 646. See And. Steph. Pl. 230: cases, 2d ed. *Mellus*.

§ 3. *Frustra probatur quod probatum non relevat* (It is vain to prove what is not alleged) and cognates are the authorities of the theory of the case as advocated by Mr. Thompson (§§ 2310, 2311, 2 Thompson Trials; 1 Bates' Pleading, Practice, Parties and Forms 511, 512; And. Steph. Pl. 230: cases, 2d ed.). In relation to that maxim (Vol. II) its cognates are mentioned. This maxim is well illustrated in a late case in Missouri which quoted and followed New York cases. In the next section we will quote from that case, first observing that the argument is an unusually important one as may be judged from the conflict of cases which will indicate the disruption of procedure in several states. See ILLINOIS; MISSOURI; NEW YORK; OHIO; INDIANA.

Soon after the Code was adopted in New York and in Missouri an enlargement of the law of waiver began.

Cowing, 79 N. Y. 167; McGoldrich, 52 N. Y. 612; Knapp, 96 N. Y. 284, 294; Fear, 118 N. Y. 454, 458; Sterrett, 122 N. Y. 659, 662; Bally v. Hornthal; And. Steph. Pl. 230: cases; Cf. Southwick, 87 N. Y. 420; Dovaston: 217: cases.

In Colorado, the decisions show that any kind of matter is the foundation of a judgment.

See Hume: cases; Rensberger (sham pleading). Cf. Thomas: 15: cases; Supply Ditch.

In Indiana, certain essential pleadings have been waived.

Wagner, 122 Ind. 57: cases; Carmel Co., 150 Ind. 427, 431, 434, 435. Formerly it was held that a special finding in a verdict would aid a complaint. See Hitchcock v. Haight: 12: cases.

In Missouri, conduct may supply record matter.

Fearly, 149 Mo. 467, 73 Am. St. 440;

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Devoy, 192 Mo. 197, 201 (may depart from pleadings); Hill, 140 Mo. 433 (answer may be waived); Hall, 138 Mo. 577 (stipulation may dispense with the mandatory record); S. v. O'Neill, 151 Mo. 67, 81 (*Allegans contraria*); Birkson, 144 Mo. 211, 220 (assumed issue binds); Bragg, 192 Mo. 331, 366, also Mellor, 105 Mo. 455 (view procedure as local, and as originating from legislation); Matousek, 192 Mo. 588, 596 (plea of *res adjudicata* declared from ta.k); Hogan, 195 Mo. 527 (*Allegans*; one cannot invite error and then complain of it); Ricketts, 150 Mo. 64; Roden: 12b, 192 Mo. 71 (a reply may be waived); Chapman, 99 Mo. Ap. 127, 134 (a motion for new trial: "We permit it to be as unspecific as the ingenuity of a defeated lawyer can find language in which to conceal what he really means"); 2 Thomp. Tri. 2310, 2311; 1 Bates, Pleading, Practice, Parties and Forms, 511, 512, And. Steph. Pl. 230: cases, 2d ed. See MISSOURI; CAUSE OF ACTION; Thomas v. Board: 10a. Illinois can be cited either way. Fish v. Cleland: 12c (pleadings a necessity); Adams v. Gill; Franklin Lodge (contra). See ILLINOIS; Harrow v. Grogan; Gudel v. P.: 74a.

Decisions upholding the extreme view are also found in Arkansas, Kansas, Nebraska, Oregon, Montana and somewhat in California. Dearick (1807), 107 Va. 602, 59 S. E. 489, 13 Va. Law Reg. 952 (a reply may be waived); Jackson v. Giles (1903), 189 U. S. 475, 23 Sup. Ct. Rep. 639 (avertment of amount of dispute waived if not objected to). Harlan, J., dissenting. See Campbell v. Porter: 2: cases. See also ALLEGATIONS; PLEADINGS; PROCEDURE; WAIVER; APPELLATE PROCEDURE and titles there referred to; also Leading Cases 1-100, and particularly Windsor: 1; Campbell: 2; Rushton: 5 (alder by verdict); R. v. Wheatley: 19; Kewaunee: 29 (code); Iverlie: 46: cases; Munday: 79: cases; S. P. Sache v. Wallace (Minn. Code); Green (code): 90; Perry v. Porter: 136a: cases; Garland: 297: cases; notes, Lampligh: 301; Russell v. Shurtleff (Colo.); Consensus; Ut res magis valeat; Omnia presumuntur rite; Quod ab initio non valet; De non apparentibus; Frustra probatur; Sache; Keator Co. v. Thompson, 144 U. S. 434 (a reply waived; Harland, judge); Great N. R. R. v. S. (1908), 208 U. S. 452 (a ground of general demurrer may be waived).

In Ohio can be found cases holding that the demurrer searches the whole record and attaches to the first fault, and if this fault is found in the statement of the case then the court will look no further; it will not look into the answer or other pleadings, much less into the statutory record; he who makes the first fault must first suffer. Trott v. Sarchett, 10 O. St. 244; Headington, 7 O. 249; § 232, Nash, Pl. & Prac. (Sibley Ed.).

Contra: A defective petition is aided by an answer. Erwin v. Shafer, 9 O. St. 43, 72 Am. St. 613; 35 O. St. 256. § 212, Nash, Pl. & Prac. (Sibley Ed.).

Legal conclusions are void. § 213, Nash, Pl. & Prac. (Sibley Ed.).

§ 4. *Mallinckrodt, etc. Co. v. Nemnich*, 169 Mo. 397 (L. C. 12a). See Mallinckrodt. From this case we take the following quotations:

"The allegation of a conclusion of law raises no issue, need not be denied and its truth is not admitted by a demurrer to

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the complaint containing it. *Kittinger v. Buffalo Traction Co.* (1899), 160 N. Y. 377, 54 N. E. 1081; 12 *Encyc. Pl. & Pr.* 1022; *Institute v. Bitter*, 87 N. Y. 250; *Haester v. Sammelman*, 101 Mo. *loc. cit.* 624.

"Codes and Practice Acts, rules of construction, only apply to formal matters and not to substance. *Kittinger, supra*. See ABATEMENT. Therefrom the question should be asked, what do the code and practice act rules amount to, either in New York or Missouri? Can legislatures prescribe for courts rules of construction that courts will uniformly respect?"

"A pleader pleads at his peril. He must know and take notice and act for himself. *Ignorantia legis*. His conclusions of law cannot be aided by the ignorance or remissness of his adversary; the latter cannot aid the conclusions of law by consent or waiver or acquiescence. 169 Mo. 397. Nor will it do to say that the defendant should have moved to have made the pleading more definite and certain. He might indeed have done this but was not compelled to do so. The primary duty of making the pleading definite and certain is on the party drawing the pleading, and he cannot, by his remissness, cast on his opponent the *onus* of doing what his own duty demands, a duty which consists in expressing his meaning clearly and unmistakably. This view is the one taken in New York, whence our code is derived. *Snyder v. Free*, 114 Mo. 360, *citing Clark v. Dillon*, 97 N. Y. 370." *Verba fortius*. See CERTAINTY; § 119, Gr. & Rud.

"And in New York it has been ruled that § 519 of this code in relation to a liberal construction of pleadings with a view to substantial justice between the parties, extends only to 'matters of form' and does not apply to the fundamental requirements of good pleading. *Clark, supra*. S. P. Young v. Schofield, 132 Mo. 650; *Bates v. Bennington*, 136 Mo. 522."

In the light of this quotation the last questions should here be considered. Also these further ones: What are the "fundamental requirements" in New York and Missouri that are above statutes? To what class of laws do those "fundamental requirements" in these states belong? If above statutes are they equal or are they above constitutions? See S. v. Bolden: 216; Oakley: 222; Indianapolis: 223. Can legislatures make conclusions of law a sufficient pleading? See §§ 83-123, Gr. & Rud.; also views from Estoppel and Collateral Attack (§§ 171-261, Vol. I, Gr. & Rud.); Taylor v. Sprinkle (Ill.); PRESCRIPTIVE CONSTITUTION.

"From necessity facts must be pleaded to invest the court with authority to act. Conclusions of law will not do."

"In no other way could the facts be presented so as to raise an issue for a jury to try, or for a court of equity to grant relief upon. See above authorities, and *Cooper v. Frende*, 52 Iowa, 531; *Seeley v. Engell*, 17 Barb. 530; 169 Mo. 399."

"The trouble in this case is not that an allegation is defective in form, or is general, or too general (*Dobson*: 232a), but

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the trouble is there is no allegation at all. The pleading is fatally defective; the equitable relief prayed, if granted, cannot find support upon the pleadings." 189 Mo. 399; *De non apparentibus*; *Verba fortius*; Story (§ 10); U. S. v. Cruikshank: 232.

Mallinckrodt: 12a will sustain the view that the necessity for pleadings is above statutes or the resolves of men or conventions. It demands a record and a sufficient record for "fundamental" reasons. Here again let us ask for those reasons: Where can they be found in American law differently to Roman or English law? Where are they better stated than in the explications of the maxims, *De non apparentibus*, etc., *Verba fortius*, etc., and *Frustra probatur quod probatum non relevat*? See *Lex non exacte*; *Regula pro lege si deficit lex*; *Melius petere fontes quam sectari rivulos*.

"The Roman still holds dominion over this world by the silent empire of his law."

§ 5. What are "fundamental requirements" of pleading; enumeration; illustration. American legal literature abounds with the expression "fundamental requirements" which is no more expressive than "due process of law." It is more of a generality than are maxims. It seems well to pause and ask, what do writers mean by the expression "fundamental requirements"? It is important to know. Now, if the student will present the pages where the expression is found and ask teachers, authors and lawyers exactly what it means he will learn that the inquiry will elicit a great variety of response; many of the answers will sound learned but will leave no definite impression upon the intellect. To illustrate: Let us ask what is meant by the "fundamental requirements" of pleadings. Who will illustrate these with enumerations and citations? Name some of those fundamentals? Where are they found? Where are they discussed and demonstrated? Are they expressed in written constitutions; or are they implications? Of what dignity are they? Are they of constitutional or statute or common law dignity? How shall these fundamental requirements be classified is an important question for the constructionist. Is *De non apparentibus et non existentibus eadem est ratio* one of these? Is *Frustra probatur quod probatum non relevat* another?

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Is *Verba fortius accipiuntur contra proferentem* another? Have these maxims old and widely cited case illustrations? If so, name them. Name the most prominent and widely cited cases of all English speaking countries that illustrate those maxims. Have these maxims cognates? What are they? Relating to these matters the *Mallinckrodt Case* should be studied. This case may be cited upon the leading question of the effect of the code rules of Construction, quoted *sub VARIANCE*. Under this case what do those rules amount to? This case stands to show that formal or waivable defects will be passed if possible (*Interest reipublice ut sit finis litium*); that abatement or dilatory matter may be waived agreeably to the 13th conserving principle of procedure (§ 103, Vol. I, Gr. & Rud. See ABATEMENT). But that case holds that the code rules of construction do not affect or apply to "fundamental requirements"; that notwithstanding the sweeping words of the code, nevertheless these do not mean what they say. In the face of *Mallinckrodt*: 12a, what does the code add to the law? Do the code provisions make any change in the law? Indianapolis: 223; *Lex non exacte*.

§ 6. *The Prescriptive Constitution is organic*. The leading subjects of the law (§§ 262-303, Vol. I, Gr. & Rud.) rest upon the same basis in England and in America; but they arise from and rest upon the prescriptive constitution in England and they rest on nothing else in America. The principles of that constitution were expressed in the first covenants of society. These principles are organic and control; these are high and solemn covenants, and like the covenants in a deed, they not only bind the original parties, but they bind the heirs, the privies and their descendants as well. The grounds and rudiments of law (§§ 45-72) are *datum posts* that stand for and light the way of all ages. New law has not been created in America; there is no new law. Desolating and wasting attacks on the old law are not new law any more than the wild orgies of the French Revolution created new law. Restoring old and down-trodden laws is not creating new law. There is nothing new

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in the prescriptive constitution, nor is there anything in it that can be long neglected nor too far departed from. There are limits of that mischievous theory of presumption and ignorance—the theory of the case—and these will be reached as the well directed attention of the student is drawn to the consequences of the attempt to adopt that theory in several states.

§ 7. *Supreme courts are the most important agency of government. In presentia majoris*. Upon them depends the vindication of the grounds and rudiments of law—its fundamental principles—*stare decisis* and the due administration of the laws. For these great ends supreme courts must construe and conserve; for these great ends from necessity the letter of constitutions and of statutes—codes and practice acts—must yield. *Salus populi suprema lex; Boni judicis est ampliare jurisdictionem; Regula pro lege si deficit lex; Lex non exacte definit, sed arbitrio boni viri permittit* (§§ 45-123, Vol. I, Gr. & Rud.). Church; *Expressio eorum; In presentia majoris*. If lower and intermediate courts are nullifying and emasculating the conserving principles of procedure, nullifying constitutions and statutes and frustrating implications for the public welfare, it is the duty of supreme courts to take jurisdiction and to construe constitutions and lower laws for the advancement and perpetuity of government, but such construction should be in accord with fundamental principles. *Lex non exacte*. End. Stat. 182.

For the vindication of the chief purposes of government supreme courts are created and exist. For these ends such courts must construe and decide. Constitutions and their implications are a trust confided to supreme courts and not disrupting, nullifying, arrogant and inferior courts. *U. S. v. Standard Oil Co.* Jurisdiction cannot be partitioned on exact and simple lines. Courts and their creation, organization and procedure should be simple and direct. The life and energy of the lawyer should not be wasted in studying a mass of statutes and conflicting decisions arising therefrom. *Res est misera ubi jus est vagum et*

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incertum. See ILLINOIS; MISSOURI; Dovaston: 217. One supreme court, one scheme of trial courts and inferior and municipal tribunals would unify, simplify and expedite. A supreme court might be of any number and these in divisions, but for setting the paramount matters already mentioned the entire court must establish and supervise. The English Judicature Act, adopted by Connecticut, embodies the true ideas. Legislatures have never succeeded in prescribing juridical means for a judiciary; the latter must speak and construe for itself when it comes to the last analysis. Dovaston: 217; *Lex non exakte*. It is from the prescriptive constitution that are found the means of operating a judiciary for a great government. *Expressio eorum; In presentia majoris; Benedicta est expositio quando res redimitur a destructione.*

- § 8. *Consequences of ignoring the higher law.* When the American judiciary commenced looking to constitutions and statutes, and the precise letter therein, their horizon was narrowed as it is for one digging a well. Then they set the legal profession to digging; it made digging tools—digests, cyclopedias and statutes—a necessity. The astronomer's means of reckoning from fixed stars were denounced. Courts that have discarded the mandatory record have found a grave they have dug for the trusts confided in them. Such courts have destroyed the value of their decisions, which the legal profession has idly and stupidly praised, instead of discharging the duties which it owes to government and to society. Every case is made a law unto itself; it gravitates down, down, down, into rivulets and into a marsh where it is lost in the limitless expanse; there none can follow it or conduct, who cannot run, sail, fly or wallow, as may be required in successive turns. There is no conduct of causes from fixed reckonings in many courts. Therein it is rather a condition for the work of saurians or sharks than for astronomers. Cases are disposed of in violation of all principles; their preparation for this is masses of irrelevant matter, "useless grists of profuse jargon," out of which all

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kinds of cases are set up by jugglery and usurpation. See U. S. v. Standard Oil. The drift of jurisprudence into chaos is easy if fundamentals are disregarded. The consequences are unbelievable. What has happened may be judged from the discussion with citation and illustration next to follow.

- § 9. *The theory of the case is destructive of the conserving principles and the uses of the mandatory record. Essential means of certainty in appellate procedure, to resist collateral attack, support res adjudicata (former jeopardy—estoppel of record), "due process of law," division of state power, removal of causes, rules relating to the comity of courts, justification for officials, constructive notice, and respect for the basic rule of evidence already mentioned, depend upon a consistent limitation of the theory of the case.* For all these ends the respective functions of the mandatory record and of the statutory record must be accurately comprehended. Without change the former record has been the same until, within a century, attacks have been made upon it by statute, decisions, and text writers. The most serious of these has been by an absurd enlargement of the doctrine called the *theory of the case*. The origin, history, ends and purposes of the statutory record have been disregarded with a consequential effect of countenancing all kinds of matter for the foundation of a judgment, as already observed.

Frustra probatur quod probatum non relevat; Adams v. Gill: cases; LITERATURE; MAXIMS; Weltmer: 268a; Quod ab initio.

It seems defensible to say, that for every distinct foundation of a judgment there may be shown a distinct jurisprudence. Anyway, one trained to deal with one kind only is wholly unfitted to deal with the other. A lawyer who views a pleading for no other purpose than to raise an issue, is unable to comprehend it as the lawyer who views it from all the conserving principles of procedure, as a means of *identification* for all those purposes. Now, he who accepts the enlarged doctrine of the theory of the case holds views which are singularly his own. He also stands in opposition to that certainty essential for the conserv-

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ing principles of procedure. Consequently we disclose different kinds of lawyers. Concerning these matters *Windsor*:1 presents one view, and *Cooper v. Reynolds* presents another. To know each kind is very important. Each kind will examine a title depending on an official sale in a different way. Where titles are made uncertain or insecure, one of the leading ends of government falls. See CONSTRUCTIVE NOTICE; PLEADINGS; *Ubi jus incertum, ibi jus nullum*. ILLINOIS; Harrow.

The strongest and most plausible defense for the rule of the theory of the case arises from conceptions of estoppel. *Allegans contraria*; Baily: 44; 2 Sm. L. C. 950, 951, 8th ed. See WAIVER; Dorn.

But this rests on considerations secondary when we look from the conserving principles of procedure. These are primary. *In presentia majoris cessat potentia minoris*. There are limitations of waiver or of alder by verdict. *Quod ab initio*.

In equity is found a very exceptional rule applicable to certain pleas, which if denied and a trial of the issue or the assumed issue follows, the plea is construed sufficient. Sto. Pl. 697. See Pom. Pl. 597-600 (*contra*); Rensberger.

In early Illinois cases is found some countenance for the waiving of essential matters. *Brazzle v. Usher* (1820), Breese, 14 (verdict cures want of plea required to set up statute of frauds). Cf. *Hitchcock*: 12 (verdict cannot supply an omitted allegation): cases; *Adams v. Gill*; *Perry v. Porter*: 136a.

Decisions in Illinois now show that pleadings are of no consequence. See ILLINOIS; Franklin Lodge.

One form of expression indicating an unmoored view of the general demurrer may be found in the Great N. R. R. v. S., 208 U. S. 452, where the reasoning is that the ground of the general demurrer was not raised in the lower courts. See *McAllister v. Kuhn*: 3; § 242, Gr. & Rud.; *Slacum v. Pomery*.

Another this: After a demurrer is overruled to a narr., pleading to the merits is a waiver of the right to test the sufficiency of the declaration. *Suttle v. Brown* (1907), 137 Ill. App. 438; ILLINOIS.

§ 10. *Theory of the Case.—The Ambulatory Rule.*—This discussion is designed to confute the claims for a rational footing and the defensible existence of the "Theory of the Case" as it is advocated and applied in Colorado, New York, Indiana, Illinois, Missouri and more or less discoverable in some other states. The aim is to reveal the "Theory of

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the Case" as an ambulatory rule incompatible with the views that pleadings are, among other things, to limit issues and to narrow proofs, also this necessary definition of them:

"Pleadings are the exclusive juridical means of investing a court with jurisdiction of a subject-matter to adjudicate it."

From fundamental viewpoints the functions of pleadings will be surveyed and defined; in reckonings from such *datum posts* surrounding the principal question involved it will be attempted to throw a continuous and resolving light upon the claims for the ambulatory rule, thus enabling the reader to look and to judge. To enable him to do so, important relations between procedure and government will be mentioned; also that procedure reflects the nature and the structure of government; that the study of procedure is a study of government; that the rules of procedure are interactions required for the application of principles of government in the due administration of the laws which rest upon the conserving principles of procedure.

From these as a great center and fountain issue and flow an infinitude of rules which may be perceived as reciprocals or correlatives from the requirements of government in its operations. This demonstration will involve the question of whether or not there is an unwritten constitution, parts of which are fundamental maxims reaffirmed throughout the centuries on down to us from antiquity; that these maxims are no longer studied or understood as first conceived and expressed.

These maxims will be referred to as *datum posts* or "fixed stars" in government and constitutional procedure, whatever may be their changed and varied expressions; therefrom will result views tending to show that the law is an entirety; that the claims for supposed distinctions between adjective and substantive law are untenable. The argument will involve other leading and disturbing questions to which attention will be drawn.

§ 11. *Definition.*—The theory of the case may be defined for a multitude of jurisdictions as a rule of trans-

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cendent construction, permissive of gathering the facts of a case, not from their *datum post*, the "statement of a cause of action" in the right kind of pleading, filed at the right time and place with the clerk, but from all the proceedings, both at and after the hearing; also from the statutory record (bill of exceptions), if perchance an appellant wants it and further, succeeds in running the gauntlet of all the technical steps of its establishment of record. In other words the gathering grounds of the matter of the "ambulatory" rule or theory is anything from anywhere, without any respect whatever to old and necessary landmarks, or the mandatory requirements of a constitutionalism, or of *stare decisis*. It is construction defying the canons of tradition, of fundamental principles and of certainty.

Warrant for all these propositions is found in the texts and decisions which will be referred to, permissive of the *ore tenus* establishment and proof of a judgment, including its foundation.

The "ambulatory" rule is a doctrine incompatible with the old teaching that a "cause of action" should have and be moored to fixed *data* from which all reckonings, estimates, and conclusions relating to the conserving principles of procedure must ever be made. In discussing these propositions it seems necessary to refer to maxims and to ask for their patient consideration. Preface: DATUM POSTS.

Viewed from the maxims, the oldest and most firmly fixed *data* of the law, the "ambulatory" rule may properly be called by that name. By it almost anything can for the occasion be established or overthrown. It might well be called the chameleon rule. It is here today and yonder tomorrow, like the Arab who folds his tent and silently steals away.

§ 12. *It is opposed to a constitutionalism.* This rule never has had and it can not have a footing in a constitutionalism, as will be perceived by reckonings from the *datum posts* of jurisprudence, some of which must be expressly mentioned for prominence for uses of this argument. Of these there are not really

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more than ten, but they are paraphrased so that there often appear more. The same rule is susceptible of wide and varied expression, as will appear.

§ 13. *Enumeration of "fundamental requirements."*—To support the general proposition that there is an unwritten constitution, attention is drawn to the leading principles next enumerated, which are offered as fixed axiomatic and indisputable rules in the due administration of the laws. Like the covenants in a deed, they bound the parties thereto and their heirs, privies and decedents for all time. Therefore, it will be attempted to elucidate them as organic, as primal covenants of society, and equal in dignity and importance to any gathering of words in written constitutions. In relation to this proposition particular attention is invited to the first, second, fourth, fifth and sixth. They are offered as cornerstones of juridical procedure that cannot be disregarded or abrogated in a constitutionalism. Whether they are or are not is for judgment.

1. *Frustra probatur quod probatum non relevat* (it is vain to prove what is not alleged); Fish: 12c (Ill.); Waugh v. Robbins, 33 Ill. 182; Bush v. Connelly, *id.* 447; Lang v. Metzger, 208 Ill. 475; Israel v. Reynolds: 83 (1849), 13 Ill. 218; Simmons v. Jenkins (1875), 76 Ill. 479; Chitty v. R. R. (1896), 148 Mo. 64, 74, 75; Smith v. Burrus (1891), 106 Mo. 94-106; Mallinckrodt: 12a, 169 Mo. 388. Cases from Colorado, Indiana and New York, under Hume v. Robinson, Munday v. Vail: 79; Sache.

From time immemorial it has been the rule that a party must prove his case as pleaded. But of late a new doctrine on this subject, a revolutionary doctrine, a doctrine that threatens the dismemberment of jurisprudence, and from some standpoints the foundation of government itself, has come to be recognized and countenanced as a permanent establishment, from a multitude of decisions. Under this new rule a party is no longer confined to the allegations, denials and issues presented by the pleadings, but may raise at the trial and enmesh with evidence, issues about which the pleadings are silent.

2. *De non apparentibus et non existentibus eadem est ratio* (a fact not made judicially to appear cannot be judicially considered, or in other words, a fact not made judicially to appear, is presumed not to exist). U. S. v. Cruikshank: 232.

3. *That allegata et probata* must correspond which is a corollary of *Frustra probatur quod probatum non relevat*, *supra*. Bristow v. Wright (L.C. 135: cases), Smith's Leading Cases, 8th ed.; Wabash R. R. v. Friedman: 137, 146 Ill. 543; Eddy Co. v. Blackburn (L.C. 136), 70

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- Fed. Rep. 949; Perry v. Porter (L.C. 136a), 124 Mass. 338.
4. *Verba fortius accipiuntur contra proferentem* (every presumption is to be made against a pleader). *Dovaston v. Payne* (L.C. 217), *Smith's Leading Cases*; *U. S. v. Cruikshank*: 232; *McCarty v. Hotel Co.*, 144 Mo. 397, 402.
Verba fortius, etc., is not only a fixed star in the juridical heavens, but it is also one of the first magnitude. It is a rule of limitation and to make certain. Its operation is that what is not stated does not exist. It supports the canon, "What ought to be of record must be proved by record and by the right record" (§ 104, *et seq.*, Vol. I), also the views from estoppel and Collateral Attack (§§ 171-261, Vol. I), also, what is not juridically presented can not be judicially considered. Its gathering grounds are domains of reason, logic, morals, mercy and protection. It governs the process and its return; the caption of the pleading, the statement of the wrong or the defense, the prayer, the judgment and the exercise of authority under it; it applies throughout appellate procedure. In the presentment of a case for review, what the records, the mandatory and the statutory records, do not affirmatively present is presumed not to exist; error must be affirmatively shown, and especially is this true in construing the statutory record; this record is surplusage except as error is assigned upon it; as to this record there is no error unless it is assigned; waiver of error is continuously sought, favored and declared, if consistent with the record. *Verba fortius* is strictly and technically applied in testing a record for *res adjudicata* purposes, or to show an estoppel of record, or to prove the title to property founded upon a judgment and its record. Estoppels are odious is a rule of *Res Adjudicata*, and is a paraphrase of *Verba fortius*.
 5. *Expressio unius est exclusio alterius* (the express mention of one thing implies the exclusion of another).
 6. "What ought to be of record must be proved by record and by the right record." This rule is a corollary of *De non apparentibus*, *supra*.
 7. There shall be no departure.
 8. Variances are opposed to essential certainty and protection.
 9. The provisions of the code hereafter quoted and particularly the requirements that the statement shall set forth a "cause of action"; that filing an answer shall not waive this, and that all relief shall be within the facts stated. The significance of these various provisions is not appreciated by those who contend for the ambulatory rule. For if the complaint and its contents cannot be waived by filing an answer, then when and where and how may that be waived? May not that defect be raised upon objections upon collateral attack, or when the record is offered to prove an estoppel or title to property founded on a judgment? See *O'Brien v. F.*, 216 Ill. 354, 363, 108 Am. St. Rep. 219; *Franklin Union No. 4 v. F.*, 220 Ill. 355, 110 Am. St. Rep. 248, 4 L. R. A. (N. S.) 1001.

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10. The general demurrer searches the whole record and attaches to the first fault, not to the second or later ones.
 11. The ground of the general demurrer is never waived but may be first raised or renewed upon motion in arrest of judgment, or first raised or renewed upon collateral attack. What cannot be waived "by filing an answer" can be raised on collateral attack. When this is perceived the code will no longer be viewed as a mystery. Then cases like *Emerson v. Nash* will be seen to agree with *Rushton v. Aspinall* (Mansfield): 5, *Smith's Leading Cases*, 8th ed., reaffirmed by *Kent in Bartlett v. Crozier* (1820), 17 Johns. 448, 8 Am. Dec. 428 (L.C. 6). *Emerson v. Nash* is good law, is one of the ablest code cases by possibly the greatest living code expounder (Judge Marshall). However, we cannot give assent to his statement in that decision that the code is a radical departure, and no longer respects the certainty essential for the conserving principles of procedure. Judge Marshall's law is sound, but he overlooked the doctrine of the *Rushton* case, *supra* (L.C. 5). In the light of such facts the reader can see that both Mansfield and Kent correctly asserted the basic principles of the code. Also that the denouncement of the maxims and cases reaffirming those is not defensible.
 12. Consent cannot confer jurisdiction of subject-matter. This is a corollary of 8th, 7th, 8th and 9th rules, *supra*, *Campbell v. Porter*: 2; *Perez v. Fernandez*; *Windsor v. McVeigh*: 1.
 13. The origin, history and functions of the mandatory record in a constitutionalism.
 14. The origin, history and functions of the statutory record (bill of exceptions), to which record applies *Expressio unius*, etc., *supra*.
 15. A court is bound by its record and by the right record made to bind it by the parties filed with the clerk. This must be true in a constitutionalism, and wherever the division of state power is respected.
 16. The code and practice acts specifically provide for the records last mentioned and above all other systems minutely and expressly provide for them and their respective functions. The ambulatory theory is opposed to the foregoing views.
 17. *Regula pro lege si deficit lex*: Where the law fails the maxim rules.
- § 14. *The ambulatory rule is a tremendously disturbing element of "American law"* and is a transcendent rule of construction, which rule has been so applied by several courts as to change the nature and the structure of constitutions. Life and death, health and sickness, are separated by nothing more than a film or a breath. And likewise law and anarchy, constitutionalism and absolutism, are separated by nothing more than a sheet of paper and the ceremonies of the division of state power. The "ambulatory" rule often appears as a rule of evidence, often as a rule of pleading and often as a rule of practice. Accordingly it pervades and affects all procedure, and as we shall see, its influence flows

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through every vein and artery of government (§§ 83-123, Gr. & Rud.).

For brevity we shall call the theory of the case the "ambulatory rule," for this will prove a somewhat suggestive name for this amphibian, figuratively speaking, in procedure when we come to the inquiry as to which record, the mandatory record or the statutory record, supports that rule, which has so deeply eroded the fundamental principles of jurisprudence, thereby not only wrecking for states what treasure cannot restore, but the juristic fame of great writers, judges and courts. See VARIANCE. This newcomer, this intruder, this disturber of American law, has led high authorities seriously to maintain "that pleadings are of no more consequence than any other notice to a party, and therefore they may be waived like any other notice." They say, that the case arises from and is founded upon the evidence that "the jury find from the evidence and not from the pleadings."

2 Thomp. Tri. 2310, 2311; Ell. App. Proc. 717; And. Steph. Pl., § 230, 2d ed. See cases cited, Hughes' Proc., 29-32.

The confusion resulting from the doctrine is also indicated, 2 Cyc. 691-692; cases; *Id.* 715; 12 *Id.* 372, 390; 16 *Id.* 403-406. Scores of pages therein can be cited *pro* and *con*. They present a maze of cases that is utterly bewildering. The law cannot be determined from such a condition.

§ 15. *Maxims as Datum Posts*.—An intelligent discussion of the doctrine in question requires a sufficiently minute description of its connected subjects. The importance of the matter in hand demands an explicit statement of these cognate subjects, for a case well stated is more than half argued. Inseparable principles of the ambulatory rule are discussed in the maxims, *Omnia præsumuntur rite et solemniter esse acta* (all acts are presumed to be rightly, regularly and validly done); *Præsumatur pro iustitia sententiæ* (the justice of a sentence should be presumed); *Ut res magis valeat quam pereat* (it is better to conserve than to destroy); *Allegans contraria non est audiendus* (he who alleges contradictory things shall not be heard); *De non apparentibus et non existentibus eadem est ratio* (what is not made juridically to appear can not be ju-

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dicially considered); *Frustra probatur quod probatum non relevat* (it is vain to prove what is not alleged); *Allegata et probata* must correspond; *Verba fortius accipiuntur contra proferentem* (a pleading is construed most strongly against the pleader); and the basic rule of evidence, namely, "what ought to be of record must be proved by record and by the right record." § 104, Gr. & Rud.

The foregoing canons have been the subject of lengthy discussions and the result has been a mystifying and befogging of the maxims and old cases affirming and elucidating them.

§ 16. *A number of our courts have lost respect for the maxims of the law*. They have come to the belief that old laws have passed away and that a new dispensation has dawned. Attractive and plausible errorists have not only been foremost in the eye of the profession, but they have its exclusive attention, and have flattered and soothed, and with a lullaby misled and deceived. They have wandered into labyrinths lighted only by the *ignis fatuus*. Warrant for these charges is to be found in the notes to *Crepps*: 113, and *Hahn*. In the last case the phrase "according to the due course of the common law" was denied any meaning whatever. This case is animadverted upon in *Galpin v. Page*: 63, where Justice Field was unable to speak with entire moderation, defending the "due course of the common law" as one of the primal covenants of society. This "theory of the case" rule is also at war with the maxim, *Concordare leges legibus est optimus interpretandi modus* (to make laws agree with laws is the best mode of interpreting them). The disregard of this maxim results in contradictions too numerous to lay before the reader. *Lex non exacte*.

§ 17. *Justice Field knew the datum posts of the law and reasoned from them*. He was a constitutional lawyer and a constitutional judge; he knew that constitutions are not of themselves the fundamental law of the land. He knew that, on the contrary, constitutions are to be read in the light of an unwritten constitution to be found in the great maxims of the law. We can find no trace of the "theory of the case" in the work

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of Field. He knew too well that no man can be brought into court without a writing, or be adjudged when in court except upon the charge as laid. If any reader wishes to judge whether Field saw the danger to a constitutional government in departing from the issues raised by the pleadings, let him read the case of *Windsor v. McVeigh*: 1, decided by Justice Field. He also decided *Indiana R. R. v. Horst*: 223. In this case he clearly decided that the conserving principles of procedure, the due administration of the laws, cannot be impaired or destroyed by statutes.

§ 18. *Fallacies and illusions that confuse.* There are several prevailing fallacies which can be clearly detected and defined only by reckoning from the *datum posts*. One of these fallacies is the "ambulatory" rule; another is the illusory distinction between adjective and substantive law, the latter involving the question of the entirety of the law; another is that American jurisprudences have no unwritten constitutions; another is that there is a distinctively American law; another is that there are new principles of law; that the rudiments of the ancient and medieval law are not at present the fundamentals of the "modern," the "new," the "late," the "American," and the "enlightened jurisprudence"; that the knowledge of the "up to date," the "latest" law does not involve all that has long been established and known. But we have abandoned our heritage, and without guide or compass, have wandered into wildernesses of case law. § 25, Gr. & Rud.

§ 19. *From datum posts the lawyer must start if he would unlock the philosophy of the law.* He must know the technics of the law. These *datum posts* and technic marks are from antiquity and they are for eternity. They are clearly within the divine injunction: "Remove not the ancient landmarks which thy fathers have set."

§ 20. *The liberal rules of pleading.* At this juncture it is well to make mention of the relation of two maxims to the "ambulatory" rule. One of these is, *Ut res magis valeat quam pereat*, already mentioned, and the other is *Allegans contraria non est audiendus* (he who alleges contra-

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dictory things shall not be heard). The former is the limit of the liberal policy in construction. There is a liberal rule in pleading and construction and *Ut res magis valeat quam pereat* (it is better to conserve than to destroy) expresses it fully; as it existed in the ancient law so it does in the modern and the latest "American," except where the "ambulatory" rule has been swirling around in its ebbs and flows. For this "ambulatory" rule has high-tide and ebb-tide in the courts that apply it as their decisions show. This rule of liberal construction, however, springs from waiver; which never supplies jurisdictional matter, as is sought to be done under the "ambulatory rule." The doctrine of waiver has a very strictly guarded application in criminal law, in equity, and under codes. To what extent it exists in the common law and so in civil cases must be judged from *Rushton*: 5. Mansfield denied the "ambulatory" rule in that case. It is discussed in the notes thereto under the name of "aided by verdict"; elsewhere it is often called "aided by pleading over." All these mean is that formal objections are waived if not aptly objected to. In a constitutionalism they cannot mean more, as we shall see. Those rules are reaffirmed by the code, wherein they mean no more than in *Rushton*: 5, as we shall see.

§ 21. *Mallinckrodt*, § 4, *ante*, the rule of Justice Field. The cases of Justice Field deserve the closest consideration, especially those relating to procedure and constitutional law. These cases will not lead to the belief that pleadings can be waived; that a court is not bound by its record, nor that a trial means a license to adjudicate upon anything and everything counsel may conjure. Many cases can be cited to show that a court is at liberty to embark upon an uncharted sea, without star, compass, or sextant, in Colorado, New York, Indiana, Illinois, and Missouri. In other words, in some states the courts can be as rapacious and predacious as they choose; if they want, they can act as pirates; they can do as they please or as they are told. They can sail with letters of marque and reprisal.

To what extent the beautiful language of plausible writers has ob-

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secured the *datum posts* of the law may be judged from the foregoing cases. They contain discussions of the "ambulatory rule" and its connected questions, which show the extent to which the profession has avoided the fountains and drifted down the rivulets, or, using another figure, how it permits courts to overlook the acorns and roots and to accept for fundamental reason nothing more than "nibbling at the buds." See VARIANCE.

§ 22. Statutory or mandatory record.—

The "ambulatory rule" often arises in appellate procedure. Now, in appellate procedure, there are often two records to be considered, though sometimes there is but one, as in Windsor: 1. One of those records has a multitude of names; it is that record which is essential in all governmental operations to protect them from objections upon collateral attack; it is that record indispensable to evince the *coram iudice* proceeding, the absence or the insufficiency of which requires the proceedings *coram non iudice*, or, in other words, a nullity, or a void and fruitless thing. This record embraces the writ, pleadings and judgment, and in a recent work on procedure is called the "mandatory" record in contradistinction to the bill of exceptions, which, for brevity and antithetical suggestion, is defined as the "statutory" record.

§ 23. The mandatory record a necessity.—

The mandatory record is necessary to show and to prove the jurisdiction—the authority—of the trial court and to impart constructive notice of its proceedings, and to resist objections upon collateral attack, among other things. §§ 171-261, Gr. & Rud.

The "statutory" record was first given by a statute in A. D. 1286, which has been re-enacted in all English-speaking jurisdictions.

The "statutory" record is for an appellant in a court of errors only, and for no other use. It wholly depends on an assignment of errors, without which that record is vain and fruitless. *Utile*. Only for error assigned, precisely defined, on the statutory record will that record be opened or considered. Without an assignment of errors, defects in the statutory record are waived. It is otherwise with the mandatory

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record, errors upon which may be reached without a bill of exceptions, or without objections or exceptions made or noted or reserved. See ABATEMENT; APPELLATE PROCEDURE; CODES.

§ 24. Consequences of confusing the two records.—

The evil of the "theory of the case," or ambulatory rule, thus partially results from the fact that it confuses the office of these fundamentally different records. It attempts to pad upon the bill of exceptions the function of the pleadings so that matter appearing in the bill of exceptions may be considered on appeal, irrespective of whether it appears in the pleadings. As a result the office of the record proper is destroyed, because a search of that record in its proper repository, the court, can no longer disclose whether the judgment is within the issues or not. The judgment may indeed be entirely unwarranted by the pleadings, but the searcher must, under the ambulatory rule, look to see what questions counsel asked at the trial before he can say whether the judgment is good or bad! This means that if no appeal has been taken, and bill of exceptions filed, the searcher must find the court stenographer and if possible learn from that personage what were the issues in the case. To such a drear and foreboding practice must we come under the "theory of the case" innovation. Well may such a rule be called "ambulatory," and so might be the unfortunate pursuer of the court stenographer. Yet the only alternative to this stenographer hunt is to hold that the "statutory" record cannot be looked to to uphold a judgment, or to resist objections upon collateral attack. This is a Scylla and Charybdis choice, but some of the courts sustaining the ambulatory rule have adopted the latter course, and so present to the world the spectacle of a judgment good against the appellant, but void as to all the rest of mankind. See ILLINOIS; Harrow.

§ 25. The ambulatory rule roams at will.—

It may arise from either the mandatory or the statutory records. In this latter predicament are the states last mentioned, where this hybrid new-born rule has introduced a veritable Babel. It has filled them with antinomies. To illustrate: The

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cases in these states show that a record may be upheld and vindicated as *coram judice* on appeal, but the same record be vulnerable as *coram non judice* upon collateral attack. In other words, in these "ambulatory" states the statutory record is substituted for the "mandatory" record upon appeal, although when the same judgment is subjected to collateral attack the "statutory" cannot be so substituted for the "mandatory" record, because the *coram judice* proceeding upon collateral attack is held to depend wholly and exclusively upon the mandatory record. Or, the matter may be seen from this viewpoint. The new "American" doctrine admits a judgment to be good in appellate procedure, but declares it bad when it is offered to prove estoppel of record, or title to property founded upon that record. Now, a court stultifies itself when it declares the same record *coram judice* for one purpose and *coram non judice* for another purpose (Harrow); such an attempted distinction is contrary to reason and to morals. The law does not tolerate absurdity for fear of the terrible consequences to which it leads; *Uno absurdo dato infinita sequuntur* (from one absurdity an infinity follow); it abhors a contradiction as it is said to abhor a title suspended in *nubibus*.

§ 26. *The clerk as master of the record.*—One of the consequences of this "theory of the case" rule is the breaking down of the constitutional division of state power. Our constitutions, both federal and state, recognize the office of clerk, just as they recognize the office of judge. He is often required to be elected by the people, and has cast upon him the duty of building up the record, by which, and by which only, the court can be known. The judge can no more usurp the function of the clerk, than he can usurp the function of the governor or of the legislator. The judge is not the court, he is but part of the court. The court is made up of judge, clerk and sheriff, assembled according to law and each performing his function as a distinct arm of the tribunal.

When the judge undertakes to perform the duty of the clerk, by reciting in the court record the existence of jurisdictional facts, he is

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doing what the Star Chamber did in England, he is creating jurisdiction for himself, which in plain English, means he is creating an absolutism.

In a constitutional government, jurisdiction depends upon facts, and the existence of those facts, it is the duty of the clerk to record. These facts are jurisdiction of the subject-matter and of the parties, and an issue between the parties which the judge is to decide. It is only by the clerk that these facts can be made to appear to the court, it is only through the clerk that the issue can reach the court. Any other position leads to the "theory of the case" rule, under which the judge is allowed to ignore the pleadings and frame up new issues at the trial. 2 Thomp. Tri. 2310, 2311; 1 Bates, Pl. Pr. Part. and Forms, 511, 512. The "theory of the case" wipes the clerk out of existence. It destroys important sections in constitutions providing for clerks.

We ask our readers in their respective states to consult their constitutions and then say whether a constitutional government can exist without a clerk. The Roman praetor would not have taken long to answer such a question. But we have forgotten the fountains and strayed down the rivulets. § 25, Vol. 1. We are so busy hunting cases, we have no time to think of principles. *Melius petere fontes quam sectari rivulos.*

§ 26a. *Extent and effect of rule.*—The ambulatory rule was never given a footing in the civil law, or the English, or in New England or the Southern States, and (only to a very slight degree) in the federal courts. Its domain is in Colorado, New York, Illinois, Indiana and Missouri, though its footprints are found in states adjacent to those of the central group mentioned. Its presence is most notable in Colorado, wherein it is expressly held that the statutory record is the principal record and controlling record, and that it is such because it is made at or after the trial by the parties and the judge, and therefore the clerk's record, the mandatory record, is inconsequential.

The clerk, a constitutional officer, and his record, are expressly construed out of the scheme of government. In other words, the ambula-

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tory rule overrides the constitution and its establishment of the division of state power. Accordingly, the judge takes the place of the clerk and is the "big" one. *In præsentia majoris cessat potentia minoris.*

Illinois is not a code state, but like Massachusetts and Michigan, is a practice act state. It is a practice by Illinois, of Illinois, and for Illinois. This state and New York are close after Colorado, in marking the high tide of the "ambulatory" rule.

§ 27. *Codes are no authority for departures.*—Here it may be well to state that the code is not responsible for what has happened. Bacon was the first great national codifier; his 100 ordinances for the procedure of the high court of chancery have governed that court ever since; and the same practice governs equity procedure in the federal courts. David Dudley Field, the author of the original American Code, merely re-expressed Bacon's ordinances in another language, and hence the code is founded on the equity system; the regulation of details may differ but the idea is the same. The nomenclature is changed, but the spirit is from of old. Field said:

"The Roman still holds dominion over this world by the silent empire of his law."

This will be perceived upon a consideration of Paul's trial; one of the great principles therein discussed is found in § 10, Story's Pleading, but in a different verbal setting. See Story. Therein were discussed *De non apparentibus et non existentibus eadem est ratio*, and *Frustra probatur quod probatum non relevat*, and "What ought to be of record must be proved by record and by the right record."

From these principles and their cognates a constitutionalism can be evolved. They are parts of an unwritten constitution. They can not be departed from. They exist in every government of limited and defined powers. They can not be extirpated or abridged or impaired. They are the core, the heart and the vitals of a prescriptive constitution.

§ 28. *Protection; principles of the prescriptive constitution.*—These basic principles of a constitutionalism are at eternal war with arbitrariness, in aid of which is now being enlisted this new and powerful ally, this "theory of the case" or "ambulatory"

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rule. Lange: 159. As we shall see, it might well be called the mystic rule of arbitrariness and oppression, or the anti-constitutional rule, or the greatest disturber of the equilibrium of the division of state power, of due process of law, and of other conserving principles of the supreme law of the land; or the dispenser of those ceremonies that must precede the condemnation of life, liberty, and property in every government of defined and limited powers. §§ 110-123, Gr. & Rud.

It is intellects that understand and rightly apply those principles that make a state. They made Rome grander and prouder and more fitted to rule, than did her armies and navies.

"Peace hath her victories not less renowned than war
Where the outlook is guided by a fixed star;
That leads a kindly light from chaos shoals afar."

§ 29. *The ambulatory rule—as viewed from the maxim, Verba fortius accipiuntur contra proferentem.*—Every great edifice or engineering work is drawn from some datum post of plane, from some dominant initial. Unless this is known and agreed upon among architects, engineers and builders, then they cannot all work together in concord for the perfection, the harmony and the symmetry of a structure. To illustrate: It is observed that only the Greek could draft and direct the erection of the Parthenon, which was drawn from an initial principle and point of reckoning, which was buried with him. The drafts and the engineering reckonings of the Greek are unknown to later and to modern architects. He studied from nature and from dominating initials which he well comprehended. He studied the ant, the bee, the spider and the mud-swallow. Great lessons may be learned from little things. It was a great and a wise king and counselor who said, "Go to the ant, thou sluggard; consider her ways and be wise." Marvelous secrets lie buried with the ancient. No living architect can draft his wonderful creations. The great bridges, canals and dams are all drawn from some fixed initial from which all estimates are made. The mariner reckons when out of sight of the headlands from the heavenly bodies; by wonderful and

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ever certain lights he is guided over vast and trackless depths.

If there is distinctively American law it is what now constitutes the matter of our unwieldy literature. It is a vast conglomeration of parrottings. Those who do not know a note nor the scale are directors of orchestras. In American states are more than a score of these playing after the fashion of Blind Tom. From the ensemble more of discord and jargon is gathered for law than authors recognize.

§ 30. *Datum posts of protection.*—As it is with all these, so it is with the drafting and framing of government. Governments have their *datum posts* or dominating initials as well as other structures; and those who frame, who direct and participate in the management of government must know its *datum posts* if they would guide aright. All governors should be well instructed as to the fact that every government of freedom and of protection is necessarily drawn from the same old venerable principles of antiquity that shine on from age to age, undimmed by cloud and undisturbed by storm.

In the case of government these *datum posts* are the maxims which are often reaffirmed in written constitutions; they have always been the unwritten constitution, which from time immemorial has led and guided the development of institutions as needed from age to age. These maxims are the very spirit of the genius of the people who adopt and utilize them; and this spirit is breathed into the government and gives it life. Accordingly a government is tyrannical or democratic as the maxims in which the people believe express a reverence for the will of a potentate, or for the will of the people. A written constitution is as nothing without these maxims.

The operation of the constitution of the United States in Turkey would permit just as absolute a government as Turkey has today. It is the unwritten, not the written constitution, that weighs most, and that unwritten constitution comes down to us in the maxims, wherein it is best preserved and expressed from time immemorial, whereof the memory of man runneth not to the contrary. The unwritten constitution is the heirloom of the ages.

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§ 31. *The Federalist sustains these propositions.* Hamilton knew the use of maxims, and he commended them to the students as the easiest way to a mastery of the principles of government. At this time it is instructive to inquire, what are some of the basic maxims of government? If they be named and shown to be determinates of the character, nature, and structure of government, then a practical illustration of Hamilton's theory will be afforded. Further, if there be such maxims, and they are shown to be fundamental principles of codes and practice acts, of evidence, pleading and construction, then it will appear that the student of procedure must needs search far beneath the surface. He must look to something more than the sections of a code or of decisions thereon.

Further, the relation of the "ambulatory" rule to its affines and repulses affords the opportunity of referring to the necessity for an unwritten constitution in a beneficent government. Then such a government depends on the same maxims, the same unwritten constitution, that support juridical procedure, then a useful and much needed demonstration will be afforded that a study of procedure is a study of government. Certainly no more important proposition can have the attention of the jurisconsult. He will be greatly encouraged to perceive that the mastery of one subject is a mastery of more,—

"That procedure with all its volumes vast
Hath but one page."

The first of these basic maxims which we will discuss is *Verba fortius accipiuntur contra proferentem*. (every presumption is to be made against a pleader) which teaches as much of the philosophy of law as any five words we know. If there be one maxim more instructive, a greater beacon light, a "pole star" of greater magnitude, we will be instructed to learn which it is. And even should there be, still this maxim must ever be reckoned from in a constitutionalism. Its philosophy leads as "a cloud by day and a pillar of fire by night." If there be one general rule that has no exceptions, it is the rule expressed in that maxim. *Verba fortius*, etc., is thus at war with the "ambulatory" rule, because *Verba fortius* puts the burden

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on the pleader to plead and prove his case as must be in a constitutional government; whereas the "ambulatory" rule puts the burden on the pleader's opponent, by allowing the pleader to introduce evidence unsupported by his pleadings. Under the "ambulatory" rule every presumption is in favor of the pleader. The states adopting this new "ambulatory" rule are actually substituting for a pillar of our unwritten constitution, the rule of arbitrariness and of oppression, and the bar does not even know what is going on. It is time for guardians of the state to awake and take notice. Shall we change the maxim to read *Verba fortius accipiuntur pro proferente*? Those who advocate and maintain the "ambulatory" rule are squarely opposed to enlightened antiquity. They can sustain their position only upon the principles of arbitrariness, which underlies oriental procedure which is inquisitorial or barbarous. Hale v. Henkel.

§ 32. *Verba fortius, etc., with the philosophy it inculcates is the cornerstone of protection.* It is a first and the best precept to be impressed upon the mind; it is from the Roman and is as true today as it was thousands of years ago. It and its cognates express and supply the most important ideas of procedure. This maxim is one of Bacon's twenty-five which were published, and it is well explicated in Broom's Maxims. In this work it is given complete attention.

§ 33. *Wherever every presumption is made in favor of a pleader there is an absolutism;* there is a government of oppression, of arbitrariness and immorality. Of such was the Jewish law under which Paul was indicted, long imprisoned, and was to have been deprived of his life without written or any definite further charges preferred against him, only conclusions of law having been set up. But Paul was a Roman citizen and the Roman governor therefore stepped between him and his accusers and accorded him his right to a trial "according to the manner of the Romans." What a world of difference this "manner of the Romans" meant to Paul. The Roman governor was greatly embarrassed to think that the prisoner should even be detained, much less

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put to trial without a written charge, setting forth the accusation against him. At this juncture Agrippa the king passed through the Jewish province, and Paul was brought before him. There occurs in the 25th chapter of the Acts, verse 16, one of the greatest juridical passages of the world. The governor explains to King Agrippa that there are no written charges against Paul, who therefore ought not, according to "*the manner of the Romans*," be detained, and cannot be tried upon vague and general charges. Look at the majesty of that simple statement and judge between the tribunals of Jerusalem and those of Rome. Paul fully recognized the difference and chose the Roman. §§ 10-12, Gr. & Rud. Look at it and judge between the "ambulatory" rule and *Verba fortius, etc.* Look at it and say whether a Roman prætor would allow a pleader to introduce evidence not within his pleadings. Would not the prætor say to such a one, *Frustra probatur quod probatum non relevat* (It is vain to prove what is not alleged)? "The manner of the Romans" was founded upon *Verba fortius, etc.*, and its cognate, *Semper præsumitur pro negante* (every presumption is in favor of him who denies). The Romans correctly understood this maxim, *Cujus est instituere ejus est abrogare* (he who can institute can also abrogate), also *Ignorantia legis neminem excusat* (ignorance of law is no excuse).

The foregoing maxims are *foci* from which issue and flow many related rules which should be mastered by every practitioner. A study of them will broaden the vision.

There is a maxim upon the title page of Broom's Maxims, namely: *Juris præcepta sunt hæc: honeste vivere, alterum non lædere, suum cuique tribuere*: We should live honestly, injure no one, and render unto everyone his due. The use Broom made of it indicates all that Blackstone observed, where the latter quoted it with approval and adopted the views of Justinian, who articulated the entire body of the law from that maxim. Conceding all that such high authority contends for, then the student must perceive that the law can not be so written that he who runs may read, at least, read and understand the law. In

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this connection it is well to observe that the law must be studied and comprehended from its maxims or *datum posts*.

- § 34. *An illustrative case.* A case from Florida will well illustrate the condition of many of our best courts. 42 So. Rep. 529. It is due expressly to state that the court that decided the *Atlantic, etc., R. R. v. Benedict Co.* is an able one and that its citation of such cases as *Dovaston v. Payne*: 217, shows that it is a truly erudite court; it also repeats from *Mansfield in Robinson v. Raley*: 45, as to pleadings being founded in the closest logic and the soundest sense. If every student would master those two cases he would be greatly advanced. The Florida court well concluded that *Verba fortius, etc.*, applied in that state. But the court failed to make a clear and comprehensive statement as to the application of that canon in other jurisdictions; relating to that its conclusions are equivocal and hazy, as will appear from a careful reading. See Preface DATUM POSTS. However, it well presented *Verba fortius, etc.*, in its true light as a rule of morals, of reason, of logic and of necessity. Unfortunately the court did not stop there, for it went further and seems expressly to concede that a statute may overthrow a fundamental rule so well and so deeply grounded. This is asking far too much; the validity of such a statute cannot have the concord of broad constructionists. The decision is permissive of the view that a statute can change moral and fundamental law; it may be cited to sustain that proposition. It also leads the student to look to a statute, to haggle over a statute in opposition to fundamental law and to accept a statute as the origin of great and basic principles. The outlook of the decision was not broader than what is quoted in it from the code, namely, "in furtherance of justice between the parties." See ILLINOIS. Courts that are led by this quotation do not recognize *Verba fortius, etc.*, as organic law, as a part of the prescriptive constitution, indispensable for the conserving principles of procedure. Courts that deny this may properly be cited to oppose the claims for an unwritten constitution. As to this the

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reader must look and judge for himself. See Preface, Gr. & Rud., Vol. I.

- § 35. *In a constitutionalism the rule is, "what is not juridically presented can not be judicially considered nor decided," which is in direct antagonism to the "ambulatory" rule.* If every one indicted were presumed guilty, who would be safe? Would the accused be under a government such as Paul advocated, of protection, of morals and of mercy? If averring one a debtor cast the burden of proof upon him, how could he escape the entry of a judgment against and the consequent confiscation of his estate? Here is a viewpoint from an ancient and towering mountain called *Verba fortius accipiuntur contra proferentem*.

- § 36. *Procedure viewed from a molehill is one thing, while from the Alpine mountain it is quite another.* Earth has its Himalayas and these their Mount Everest. Analogously jurisprudence has its towering heights and everlasting prominences. From these, illimitable vistas are revealed and illumined. From them are gained the highest views, the profoundest instruction, and the greatest mastery. §§ 104-123, Gr. & Rud. This mountain in jurisprudence is nothing more nor less than a rule of procedure from many standpoints while from others it is a part of the prescriptive constitution.

It is indispensable for that record that supports the conserving principles of procedure which should be connectedly considered by every practitioner.

Paul's case already referred to takes us to the summit of the Everest of jurisprudence. Having arrived at that height, can we not survey the legal landscape beneath? Can we not breathe in like an inspiration the pure atmosphere of the law? Can we not appreciate the effect of a rule of procedure upon government? Can we not see that the rules of procedure necessarily reflect the very nature and the structure of government? And yet, descending from our mountain of *Verba fortius, etc.*, and delving into the mass of case law around us, we stumble upon this new "American" "theory of the case" rule, that cares naught for pleadings; a predatory rule, permitting a judge, at and after the trial,

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to gather from all the proceedings such a case as he chooses to set up instead of the case described in the statement, in the declaration, the bill, the petition, complaint, libel, indictment or information.

From these viewpoints we submit to the reader the question whether our contention that that maxim is the foundation of government is correct, and whether Hamilton's eulogy of maxims (already referred to) is justifiable.

§ 37. *Reflections from a study of maxims.* History shows that the government which has no respect for *Verba fortius accipiuntur contra proferentem* and *Actore non probante reus absolvitur* (the burden of proof is on the claimant) is necessarily tyrannical, and is doomed to destruction. Like all others, the Roman, when he came to disregard these fundamental supports of government, these boons to humanity, had to fall. Therefore, we again say, and seek to impress, that the study of procedure is the study of government. That eternal vigilance is the price of liberty was well understood by the ancients.

When Justinian attempted to remove the old landmarks by changing the expression of the fundamental maxims, his subjects instantly knew what tampering with the maxims meant. Lawyers in other ages were not slow to perform their public functions. Whether this is so in American states may well be left to the reader, in connection with what will hereafter be suggested. The ancients were attentive to and busied themselves with more than merely their "grist" of practice. Lycurgus, Solon, Demosthenes, Paul, Ulpian and Bacon spoke for all times and for all peoples. In this connection it seems permissible to suggest that *Salus populi suprema lex* is associated with the foregoing observations. This maxim is suggested from the epitaph of one of the world's most heroic figures, Leonidas, for whom it was inscribed:

"Go tell the Spartans, thou that passest by,
That in obedience to their laws, here we lie."

In his oration on the Crown Demosthenes fully appreciated that he was speaking down the ages. He has left no name for gold, but a golden name.

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Those who perceive that Marathon and its Tumulus stand for England and the western hemisphere more than do Hastings or Saratoga come to know that "antiquity did nothing in vain." They come to know that maxims are the condensed good sense of nations, that they are the acorns, the roots and heartwood of every merciful, protecting, and useful government; that the right of government to exist depends upon its recognizing fundamental rights, whether or not they are reaffirmed in constitutions or statutes. These primary rights are the unwritten constitution which is above government and its agencies.

§ 38. *The code came, but only for unification, simplification and expedition.* It was adopted in A. D. 1848, in New York, and has been established in more than thirty states. Missouri adopted it in 1847, but it did not go into effect immediately. In all codes the idea is the same, there being only differences of detail or nomenclature or phrasing. The basic ideas are the maxims in a different verbiage. The code is evolved from older systems, and to attempt to learn it without knowing whence it came is to grope in the dark. §§ 134-170, Gr. & Rud. See VARIANCE. The older systems were founded upon and respected the maxims, the unwritten constitution.

The English judicature act is a code which Connecticut alone, of all states, has borrowed. Others of the states are practically practice act states, like Massachusetts, Michigan, and Illinois. In all of the states, whether under common law, practice act, or code procedure, all the maxims herein cited are reaffirmed again and again, but of course in a varied language. This is clear only to those who know the landmarks their fathers have set.

§ 39. *Adulteration of the law.* The empiric has noted these superficial differences, but failed to note the fundamental harmony and identity of the different systems. He fails to see that all codes and practice acts are based on the same maxims, as indeed they must be unless maxims have ceased to be the condensed good sense of nations and the prescriptive constitution. *Melius petere fontes quam sectari rivulos.* In this way we have allowed the incom-

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petent and the quack to adulterate our law, just as we have allowed them to adulterate food and drugs. The law is just as easily mixed up and made a nostrum or a shoddy as is food or drugs or clothing, and possibly more easily. For if only the names of its *datum posts* be changed, the resulting change is immeasurable. Lose your landmarks, and you are lost indeed. Lose the philosophy of the law and you lose the law.

We have strayed from the quiet pastures of the law, and they are occupied, alas, by commercialism and empiricism. Our domains ought to be those of silence and reflection, but they are filled with noise and din and tumult, the clamor and the hail of commercialism. We are inundated with an ever increasing flood of cases, digests, text books and encyclopædias, all assuming to give all the laws and the latest cases. We are shocked and stunned, and our sense of right is stopped by the jar and discord of authority. The lawyer is a drudge in a treadmill. He grinds away his life running down digest after digest, to find out what has been said "in point" by some superficial judge. And when he has found what he wants, he must needs wait till the day of trial, in fear and trembling lest his opponent produce a "later" case. And the bench reflects the bar. Few judges want to think; they do not want to hear reason; they want to know what some other judge has said. Judges are too easily satisfied with "canned and labeled" law. The judge who knows a *datum post* when he sees it and will reckon and reason from it is exceptional, and is truly distinguished. How long, in the name of humanity, is this to continue? When will we come to see, as Justinian did, that the law is reason, not cases, not reading, not type on paper? *Lex non exacte*. When will we uncover from the sediment of case law not founded on principle, our too long obscured and forgotten *datum posts*, and from them make our reckonings, as does the engineer in building his bridge? When will we learn to think?

§ 40. *Frustra probatur quod probatum non relevat* has already been introduced. It was well and early explained by Festus to the Scribes and

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Pharisees. As he explained it it is taught at the mother's knee and at Sunday schools and is preached throughout Christendom. All should understand and certainly the judges. It is a truly organic rule; none other is greater. It was re-expressed by Bacon in his ordinances and is paraphrased by Mitford (Lord Redesdale), whose great work was merely rephrased by Story; § 10 of Story's Pleadings should be familiar to every student. This section and Festus' judgment in Paul's case, in Acts, Ch. 25, verse 16, are two of the greatest juridical passages of this world. §§ 10-14, Gr. & Rud. See STORY. They are the heart and vitals of protection. They are so commanding, so clear and so simple, requiring that a case be stated in writing, that a child can understand that requirement. Yet how many lawyers understand procedure as Festus, Bacon, Mansfield and Story understood it?

In the western ambulatory state there are a hundred decisions which declare the rule that a complaint or petition must state a cause of action. Still, then does that prove that its courts understand the rule? Certainly not so long as its reports contain numerous cases, holding that pleadings can be dispensed with.

A rule is not understood where it is not consistently applied. Where there is no respect for *stare decisis* there is no settled law. *Ubi jus incertum ibi jus nullum*. If written constitutions foster and breed and harbor such conditions the sooner they are dispensed with the better. Some good should come from them, not a downpour of incalculable mischiefs. All of the "ambulatory" states declare a record "fish, flesh, or fowl," as "the furtherance of justice between the parties" requires. See ILLINOIS.

§ 41. *Maxims are the Prescriptive Constitution*. To what extent the "ambulatory" rule has contributed to the establishment of such a condition is a question for the historian, who can perceive the meaning of *Cujus est instituere ejus est abrogare* (he who can institute can also abrogate). An investigation into the meaning of this maxim will disclose the influence of a judiciary upon government. Canons of reason and of logic cannot be dispensed

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with in law. *Verba fortius*, etc., and *Verba generalia restringuntur ad habilitatem rei vel personæ* (general words may be limited and restrained by particular words of description), are more necessary to republican government than any written constitution. England has the best settled jurisprudence without a written constitution; she could not dispense with "*Verba fortius accipiuntur contra proferentem*." "*Verba generalia*, etc.," was instructively applied by Judge Marshall in *Chitty v. Railroad*. Here it appeared as a rule of pleading and of evidence. But it may be asked whether any law, however high and sternly commanding, could change that maxim. Would courts permit rational and necessary means to the due administration of the laws to be abolished? Can courts carry forward the powers vested in them in disregard of such maxims of reason, logic, morals, convenience and necessity? If they have not been dispensed with, then they are *datum posts*, and a history of them is a history of the law. A supreme court by disregarding fundamental principles perverts and distorts government. It becomes a convenient, corrupt, ignorant and merciless instrument of insidious oppression. There are principles that are necessary and which cannot be changed, *e. g.*, the very nature of the statutory record demands an assignment of errors. Thousands of cases state why. The due administration of the laws demands a specification and definition of errors. Therefore they are a necessity and this is one of the major laws, one that is above statutes or other ordinances that would impede, hinder or obstruct. Therefore, courts will vindicate a rule founded on convenience, reason and necessity. But the same *rationale* goes to making objection and taking exceptions to certificates, depositions, evidence, instructions, or dilatory or abatement matter. § 53, Gr. & Rud.

Now it is absurd to have a variant theory and procedure as to objecting to, or excepting to, these different matters. *Ubi eadem ratio ibi idem jus*. Therefore, if a statute prescribed absurdity, nonsense or incongruous rules applicable to all those matters, no court should respect such a statute. *Lex non*

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exacte. Courts will defend reason and consistency in procedure. End. Stat. 182; Indianapolis: 223. There is a question of construction. It involves constitutional limitations. Judges should understand it, bearing in mind, *Cujus est instituere ejus est abrogare*.

Paul and Festus were agreed as to what *Verba fortius*, etc., meant; as they understood it, so did Bacon, Mansfield, Marshall, Kent, Story, Shaw and Justice Field and his brother David Dudley. But no two of these expressed it in the same words. Bacon expressed it in the maxim, that it might not be possible to overlook its meaning, the great author of the code stated it over and over here, there, yonder, and elsewhere but in a varied language.

§ 41a. *Application of this maxim to the codes*. Codes reaffirm *Verba fortius*, etc., again and again. They are simply affirmative statutes, as all practice acts in a constitutionalism ever must be. A statute requiring the statement of "a cause of action" in a court of record adds nothing to the law. In a court of record such a statement cannot possibly be omitted without dispensing with the clerk and his record. Nevertheless, as stated, the code commands observance of fundamental law, and safeguards fundamental rights by declaring for them again and again. And in one place thus:

"A complaint (petition) shall contain the facts constituting a cause of action in ordinary and concise language without unnecessary repetition." § 119, Gr. & Rud. See Codes; Taylor v. Sprinkle (Ill.).

It is presumed a pleader complies with this requirement, if only he can. If he fails, every presumption is to be made against him, and this rule never reverses itself. It leads to absurdity to contend otherwise. It is most strictly respected at every stage, as will be seen.

All provisions of the code should be construed *in pari materia*. See *Ignorantia legis; Maledicta expositio corrodit textum*.

§ 42. *Maledicta interpretatio corrodit viscera*. The "ambulatory" rule often depends upon the disregard of fundamental principles reaffirmed by the code, such as is above quoted, and further, the purpose of pleading, to limit issues and to narrow proofs; the provision for denials to raise an issue, that what is not properly de-

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nied is, for the purpose of the action, conclusively admitted upon the record. DICKSON: 34; DENIAL. It depends upon the loose and indefensible definition of variances as affecting the parties to the record only; the discretion vested in courts to allow unlimited amendments, and to disregard many matters upon which the conserving principles of procedure depend—the due administration of the laws. On one hand essential and stern commands are disregarded, while on the other dismembering, distorting and perverted misconceptions are embraced and upheld. Constructionists who fail to recognize the maxims given by antiquity and constituting a prescriptive constitution are in cloud and wandering. They are shifting the channels of jurisprudence; they are attempting to found a new structure upon quicksands. They are “sowing the winds.” All history teaches what follows the desecration of those great moral principles upon which jurisprudence is founded. Preface DATUM POSTS. Governments which permit that are often swept by adversity which is often invited by judicial tribunals. To what extent the official reports of several states have been destroyed by the flagrant disregard of vital principles, is left for the reader to consider.

§ 43. *Code essentials; concluding reflections.* Fundamental requirements are respected in *res adjudicata* proceedings, and relating to other conserving principles, also, the view that the same collocation of words is construed differently at different times, and fluctuatingly as they may be considered in relation to different subject-matter, is so absurdly impossible that it needs no discussion. The fact that this view is widely entertained must be conceded; but this only proves the consequence of failing to teach important, organic principles of law, which can not be departed from by any power of state.

The next quotations will also indicate the respect that code language pays to fundamental principles as well as that they are in accord:

“Filing an answer shall waive all defects except that the complaint does not state facts sufficient to constitute a cause of action, and that the court has not jurisdiction of the subject-matter.”

“All relief granted shall be within the facts stated.” See CODES; ABATEMENT; *Ignorantia legis*.

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The code expressly enumerates essentials that can not be waived by filing an answer; also that the judgment shall be within the pleadings, in other words, that the pleadings shall be the foundations of the judgment. Therefore, down to and inclusive of the entering of the judgment the pleadings cannot be waived. At what stage of the proceedings they may be should be fixed by those who advocate and prescribe the “ambulatory” rule. See *Quod ab initio*.

The judgment must be within the allegations, the admissions, the denials and the issues, is what the code in effect prescribes. Accordingly hundreds of cases can be found in all jurisdictions. In opposition to all those stands the “theory of the case.”

The foregoing are mandatory requirements, which must be respected before courts can exercise any discretion whatever “in furtherance of justice,” or punish deceit or laches relating to making objections or taking exceptions. From the above the importance of right instruction will appear. It should be understood. For a right view consider views from ESTOPPEL, RES ADJUDICATA and COLLATERAL ATTACK, §§ 170-261, Gr. & Rud.

Decisions mislead that emphasize the assertion that the code is fundamentally a new and revolutionary system and that the foregoing provisions were new principles introduced by the code. Such views lead logical minds hopelessly astray and far away from the important initials which should be correctly and clearly taught. See CODES. The Florida case above referred to should be considered in this connection.

It is well to note that equally explicit are the commands for the answer, also for the reply. Here are code provisions. All of these would be supplied by Ulpien, Bacon, Mansfield, Marshall, Kent, Story, Shaw, Field and Marshall of Wisconsin. Kolkock.

Viewed in the light of fundamental principles, the mandatory requirements of a constitutionalism, the foregoing provisions are indispensable in a government of limited and defined powers—in a government of laws and not of men, wherever the division of state power is respected

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in reference to the clerk, his records and his functions—wherever the means of usurpation and its insidious ways are carefully safeguarded and barricaded against. §§ 110-123, Gr. & Rud.

The foregoing provisions of the code are but an amplification of *Frustra probatur quod probatum non relevat* and of *Verba fortius*, etc.; the latter is one of the lawyer's ten commandments. Reaffirming the old law in new words is no ground for disregarding the code enactment, and holding here that a reply can be waived, and an answer there, and a counterclaim yonder, and a complaint elsewhere. Figuratively, these successive waivers are the first, the second and third funerals, worse than funerals, far more appalling it being to undermine and sink from view the pillars of jurisprudence. Still, this is just what the courts are doing in the ambulatory rule states. As to those provisions proclaiming the law of old, the rule should be: *Expressio unius est exclusio alterius*; *Ita lex scripta est*.

Supervacuum esset legis condere, nisi esset qui leges tueretur: It would be superfluous to make laws, unless these laws, when made, were to be enforced. Cataloguing common law rights in constitutions is superfluous; they are the same, if unexpressed. §§ 115-118, Gr. & Rud. One has a right, from the very nature of the duties of government, to the administration of justice without sale, denial or delay. Re-expressing it in Magna Charta did not create a new right. The denial or delay of justice was one of the grounds of revolution enumerated in the American declaration of independence. Denials and delays of justice are the violation of fundamental right. Declaring for it in constitutions has made no difference. With or without constitutions, every agency assuming to govern should extend protection. Where it is denied, perfidy to duty and to trust begins. Waco: 300.

The elements of jugglery, usurpation, tricks and delusions are greater factors in some courts than are the mandatory record and the imperial mandates of parliaments. As already observed, the legal profession has failed to discharge its duties.

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Multitudo imperitorum perdit curiam. §§ 11-13, Gr. & Rud.

"What constitutes a state?"

Not high raised battlements and labored mound, thick wall or moated gate;
Not cities proud with spires and turrets crowned, not bays and broad armed ports,

Where laughing at the storm rich navies ride; not starred and spangled courts,
Where low-browed baseness wafts perfume to pride.

No! Men, high-minded men."

"Men who their duties know,
But know their rights, and knowing, dare maintain, prevent the long aimed blow,
And crush the tyrant while they rend the chain;

These constitute a state."

THINGS ACCESSORY ARE OF THE nature of the principal: Finch, Law, b. 1, c. 3, n. 25. Incidents partake of the principal thing. M'Culloch: 147; *Expressio eorum*.

THINGS ARE CONSTRUED ACCORD-ing to that which was the cause thereof: Finch, Law, b. 1, c. 3, n. 4; *Cessante ratione; Melius petere fontes*.

THINGS GROUNDED UPON AN ILL and void beginning cannot have a good perfection. Finch, Law, b. 1, c. 3, n. 8. Rushton; *Quod ab initio*, etc.; White: 130.

E. g., falling to serve an infant with process. Galpin: 63; Harkness: 152.

THINGS IMPLIED NEED NOT BE mentioned. *Expressio eorum*; M'Culloch; Martin: 246. Admissions by silence. See ADMISSIONS; WAIVER.

Things incident cannot be severed. Finch, Law, b. 3, c. 1, n. 12. See INCIDENTS.

Things incident pass by the grant of the principal. 25 Barb. 284, 310. See INCIDENTS.

Things incident shall pass by the grant of the principal, but not the principal by the grant of the incident. Co. Litt. 152a. 151b; Bro. Max. See INCIDENTS.

THOMAS v. BOARD: L.C. 10a.

THOMAS v. CITIZENS' B. E. (1892), 104 Ill. 462-468. A statute required notice to all stockholders of a meeting, otherwise it should be void. But they all met and acted without notice. *Held*, their acts were valid.

Vain and fruitless things are not required. *Lex non cogit ad vana; Verba intentione; Cessante ratione*; Quinn v. P.

Ultra vires is no defence for a corporation accepting the benefits of a transaction.

Statutes are limited by fundamental law; unreasonable and absurd statutes are disregarded. The power of Parliament is omnipotent, but acts of Parliament yield to fundamental law. Indianapolis: 223; *Lex non exacte*.

THOMAS v. MACKAY: L.C. 15. (*Allegata et probata* must correspond; courts must have authority to proceed and hear causes, take testimony and enter judgments. Shutte: 291; JURISDICTION; Munday: 79; Sache; SUPREME LAWS OF THE LAND; *Frustra probatur quod probatum non relevat*.)

Colorado cases often reaffirm fundamental principles, and next deny the same. See Hume.

THOMAS v. WINCHESTER (1852). 6 N. Y. 397, Bigl. Lead Cas. Torts, 602-625,

Thomas v. Winchester.—

1 Thomp. Neg. Cases 224, 57 Am. Dec. 455, 2 Smith, Torts, 227, Bish., Cool., Chase, Cas. 65, 79 Md. 522, 47 Am. St. 426-430, 46 L. R. A. 117, 36 Am. St. 714, Whart. Neg., 2 Mech. Sales, 878, Hughes, Conts.

Cited, p. 39; §§ 150, 342, 345, 347, 348, Hughes' Proc.; § 296, Gr. & Rud.

Selling a poison under a harmless label renders a druggist liable for the consequences, even to third persons. Langridge; Blood Balm Co., 83 Ga. 457, 20 Am. St. 324, n.; Smith, Torts, 231 (wholesale dealer and retail druggist both liable). *See* Squib Case.

Manufacturer's liability to third persons. 111 Am. St. 691, 717, ext. n., 183 N. Y. 78.

Privilege as an element. Woodward v. Miller; Peters, 50 W. Va. 644, 57 L. R. A. 428, n. Liability of the seller of an article for personal injuries caused thereby. McCaffrey, 28 R. I. 381, 55 L. R. A. 822, n. Knowledge of the falsity of the warranty. Tyler, 22 Ky. L. Rep. 584, 54 L. R. A. 417. Scientist need not be alleged or proved. Tyler. If alleged it is surplusage. Cases denying this do not rest on sound principles, as we shall see.

Illustrations: The defendant, Rommerck, a retail hardware dealer, sold to the plaintiff a package of stove polish manufactured by defendant, Crosby & Co. When plaintiff attempted to use the polish, it exploded, injuring her. The declaration proceeded on the theory that there rested upon both defendants the positive duty of knowing that the polish was a dangerous substance and that they should not manufacture and sell dangerous and inflammable substances. There was no averment that defendants had actual knowledge of the inflammable nature of the goods, nor was it averred in what manner they were negligent in not knowing their inflammable nature. Both defendants demurred, Rommerck's demurrer being sustained, and that of Crosby & Co. being overruled. The supreme court in Clement, 148 Mich. 293, affirmed the overruling of the corporation's demurrer, and in the present case the court affirms the judgment sustaining Rommerck's demurrer. Clement v. Rommerck (1907), — Mich. —, 113 N. W. Rep. 286.

The question which presents itself squarely for decision is whether a retail merchant who buys in the open market stove polish which purports to be safe and proper for use, and sells the article for a purpose for which it is apparently intended, is liable, in the absence of negligence, if it turns out that the article is not adapted to the use and causes injury. In Clement v. Crosby & Co., *supra*, the court overruled the demurrer, but the declaration was so drawn that it was not necessary to decide whether or not actual knowledge of the dangerous properties must be shown to be in the manufacturer to render it liable in the circumstances, and the court expressly said that they did not mean to determine the necessity of a scientist, although the allegation of a deceitful and artful withholding

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of knowledge from the public necessarily implied a knowledge on the part of the defendant. The court cited the following cases to show that one who places upon the market a dangerous article may be chargeable for injuries done to third persons; but a reading of the cases discloses the fact that the defendants either knew of the dangerous qualities of the goods or else were guilty of negligence. Barney, 7 Lans. (N. Y.) 210; Davis, 45 Ohio St. 470; Hall, 87 Iowa, 261; Shubert, 49 Minn. 331; Carter v. Towne; Wellington v. Kerosene Oil Co., 104 Mass. 64; Elkins, 79 Pa. 493.

There are cases upon principle indicating that knowledge by the manufacturer is not necessary to charge him with liability. In Randall, 2 Q. B. Div. 102, the court held that in the sale of a pole furnished by the defendant for plaintiff's carriage there was an implied warranty that the pole was free from latent as well as discoverable defects. In Carleton, 149 N. Y. 137, it was held that in a contract for the sale of a quantity of petroleum of a certain quality, the contract was not satisfied unless the oil was free from latent or hidden defects that rendered it unmerchantable at the time and place of delivery, and that could have been avoided or guarded against in the process of refinement, or in the selection of material by reasonable care and skill. *See* also Kellogg, 110 U. S. 108; Rodgers, 11 Ohio St. 48.

In the principal case the plaintiff relied on the decisions in Craft, 96 Mich. 245, and Hoover, 18 Mich. 51. These cases ruled that in the sale of articles of food by a dealer in such goods for domestic consumption, there is an implied warranty that the food is wholesome. *See* also Van Bracklin, 12 Johns. 468. The contention was that an analogous principle ought to be applied in the case before the court, but the court refused so to rule, saying, "We are not aware that the rule of these cases has been extended to the sale of commodities like stove polish." The decision was based on the case of Brown, 47 Mich. 576. The facts in this case were briefly these: "Plaintiff sent her sister to defendant's drug store to purchase some salts and was waited upon by a clerk of defendant. The clerk delivered what he said was the article called for, but in fact it was a poison. Plaintiff took a portion of it and immediately became ill. At the trial the court instructed that if the defendant's clerk sold and delivered to the plaintiff a poison instead of a harmless drug, and the plaintiff took it supposing it to be harmless, and was thereby injured, the defendant was liable for all damages so caused. The supreme court ordered a new trial, for the reason that the trial court erred in the above instruction in that it did not include negligence as an element to be necessarily considered. The court distinguished the case from the leading case

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of *Thomas v. Winchester*, saying that in that case the liability was expressly grounded upon actual negligence. The case presents a confusion of ideas regarding tort actions based on negligence of manufacturers or dealers, and actions upon implied warranties. The case of *White v. Oaks*, 88 Me. 367, seems to be in point with the principal case. The defendants, being dealers in furniture and not manufacturers, sold a folding bed to the plaintiff without any express warranty of any kind. The bed proved dangerous to persons using it, not from defective parts but from faulty design. By reason of the fault the bed collapsed, injuring plaintiff. The defendants had no knowledge of this danger. The mechanism of the bed could be observed by the plaintiff as well as by the defendant, but neither, unless skilled in mechanics, would have been likely to have discovered the danger. The court held there was no liability. 66 Cent. L. J. 302, 461. See *Chandelor*: 374: cases.

A dealer selling milk should be liable for the spread of a contagion, like typhoid fever, therefrom. *In jure*; *Caveat emptor*.

A dealer representing a stove polish as safe on a hot stove which explodes it is liable to one using the polish although he is not the buyer. *Cunningham* (1908),

N. H., 66 Cent. L. J. 461; *Ricker*, 50 N. H. 432, 9 Am. Rep. 267; *Langridge v. Levy*. One is presumed to intend the natural, direct and probable consequences of his act, is a fundamental principle necessary for remedies, for protection. *Scott* (Squib Case). A fault should bind its author; he who first believed should first suffer.

THOMPSON, SEYMOUR D., advocated the "new and enlightened view" that pleadings can be waived—the theory of the case. 2 *Thomp. Tri.* 2310, 2311. P. 29, § 6, *Hughes* Proc. See *VARIANCE*.

THOMPSON v. WEITMAN (1873), 18 Wall. (U. S.) 457, 21 L. ed. 897, 1 Gr. Ev. 540, 1 Whart. Ror. Interstate Law, Brown, Jurisdic. Stated in *Pennoyer*: 58; *Audi alteram partem*. Jurisdiction of person and subject-matter essential. *Needham*: 261; *Starbuck*: 263; *Windsor*: 1; *Haddock*.

THOMSON v. DAVENPORT: L.C. 342.

THORLEY v. KERRY: See *Pollard*.

THORNBOROW v. WHITACRE: L.C. 333.

THORNILY v. PRENTICE (1903), 121 Ia. 89, 96 N. W. 728, 100 Am. St. 317-354, ext. n.

Idem sonans; what is. Judgment against William M. T. upon substituted service upon W. M. T., while the true name of the defendant is Willis H. T., is void as to him and not within the rule of *idem sonans*. *Wiebold*: 98.

THOROGOOD v. BRYAN (1849), 8 C. B. 114. See *NEGLIGENCE*; *Scott*; *Busw. Pers. Inj.* 105, 216: cases; cited with *Tuff, Davies and Burrows v. March Gas Co.*

THORPE v. RUTLAND, etc. E. E. (1854), 27 Vt. 140, 62 Am. Dec. 625-639, n. 1 Thayer, Const. Cas. 157, 706, 2 Kent, 340, n., Cool. Const. Lim. 708, Dill. Corp., Beach, Pub. Corp. (police power of state over property; the limitations of power). "The power of parliament is omnipotent." *Sharpless*, which is widely cited in constitutional law; *Stockdale*:

Thorpe v. Rutland.—

277; S. v. Davidson (1902), 114 Wis. 563-582; *Taylor*: 219a. See *CONSTITUTIONAL LAW*. Cited, *Hughes*, Conts.

The limitations of legislative power is a leading question. It often arises in procedure. See *RULES OF COURT*; *SUPREME LAWS OF THE LAND*; *POLICE POWER*; *INTRODUCTION*.

THOU SHALT NOT BEAR FALSE WITNESS: *Nihil possumus*.

THREATENING LETTERS: 2 *Bouv. Dic.* 1116; 2 *Bish. Cr. Proc.* 1024-1029b; *McClain*, C. L.

THREATS: P. v. Campbell; *Campbell v. P.*; cited, *Hughes*, Conts.; *Whart. Crim. Ev.* 547; *George v. S.*, 145 Ala. 41, 117 Am. St. 17, n.; S. v. Tolia, 72 N. J. L. 615, 3 L. R. A. (N. S.) 223-530, ext. n.; 21 Cyc. 921-924. *McClain*, C. L.; *And. Dic.*

Inducing a contract by. 1 Page, 249-264.

In homicide cases; admissibility. S. v. Nelson (1901), 166 Mo. 191, 65 S. W. 749, 89 Am. St. 681-710, ext. n.; 21 Cyc. 921-924.

To accuse of crime. See *SELF-DEFENSE*; *PROVOCATION*; *WORDS*; *ASSAULT*.

THURSTON v. HANCOCK: *Smith v. Thackerah*.

TICKETS: Nature of license given by *Harney*, 213 Pa. 20, 1 L. R. A. (N. S.) 1184, ext. n.; *COMMON CARRIERS*; *CONSTRUCTION*; *Cherry v. R. R.*; *Le Blanche*; *Denton*.

Include time tables. *Le Blanche*; *Denton*.

TILTON v. COFIELD: *Sub Lis pendens*.

TILTON v. GREEN: *Sub Casus omisus*.

TILTON v. E. E.: L.C. 133.

TIMBER: Sale of standing timber; requisites of the contract. See *Crosby v. Wadsworth*; *McRae v. Stillwell* (1900), 111 Ga. 66, 55 L. R. A. 513-536, ext. n.

TIME: 2 *Bouv. Dic.* 1119, 1120. See *COMPUTATION OF TIME*; *And. Dic.* Time of commission of an offense may be shown to have been either before or after time alleged. 1 *Bish. Cr. Proc.* 400, *Whart. Crim. Ev.* 103.

Time, place and circumstance may be inquired after before a witness can be contradicted. 1 Gr. Ev. 462, 73 Am. Dec. 764, n., 15 Am. Dec. 100; *Skaggs*, 140 Ind. 476, 49 Am. St. 209, n., 23 L. R. A. 781; *Chl. R. R.*, 137 U. S. 507, 34 L. ed. 747; *Nutter*, 6 Colo. 253. *Contra*: *Rose*, 18 Colo. 59.

Time is the essence of the contract at common law. *Ans. Conts.* 253; 1 *Beach*, Conts. 616-638; *Garrison v. Cooke* (1903), 96 Tex. 228, 72 S. W. 74, 97 Am. St. 906; 2 Page, Conts. 1159.

Sale of land. *Boldt*, 33 Ind. Ap. 434, 104 Am. St. 255-276, ext. n.; *Seton*; *SPECIFIC PERFORMANCE*. *Construction of terms requiring time of performance*. 2 Page, Conts. 1153-1166.

Rules of equity as to. *Ans. Conts.* 253, 254. *Computation of*. See *Id.*

TIME AND PLACE: Allegation of, in indictment for homicide. *McClain*, C. L. 381. See *Id.*

TITLE: Of an act must contain but one subject. *Expressio unius*; *Bobel*: 250; *Nigrum nunquam*. See *STATUTE*. Of an act to be considered. *Garrick v. Florida R. R.* (1898), 53 S. C. 448, 69 Am. St. 874.

Title to real estate may pass on equitable estoppel. *Lindsay v. Cooper*; *Ewart*, *Estoppel*.

Immaterial in forcible trespass. *Salus*.

Title of a cause. 2 *Bouv. Dic.* 1122, *Bliss*, Pl. 144, *And. Dic.* 1036. See *CAPTION*.

Title.—

To property; sale by a trespasser, passes, when. Bentley. See CONVERSION.

Depends on mandatory record. §§ 21, 24, 29, 53, 187, Hughes' Proc. Judgment in conversion passes title, when. Miller v. Hyde.

To property involves procedure. §§ 124a, 272, Gr. & Rud. To property on execution sale, how proved. §§ 124-132, Gr. & Rud.

Judgment roll essential for. §§ 126-132, Gr. & Rud.; best evidence required to prove. §§ 132, 278, Gr. & Rud.

TOBEY v. BARBER (1809), 5 Johns. 68, 4 Am. Dec. 326, 2 Am. L. C. 245-309, ext. n.; Sto. Ag. 431, 1 Chit. Conts. 150, 1 Beach, 371, 377, 385, 2 Gr. Ev. 521, 3 Rand. Com. Paper, §§ 1067, 1534, 1545, 1563, 1 Danl. Nego. Insts., §§ 1264, 1267, 1272, 1276, 1278, 1 Pars. N. & B. 155, 162, 182, 217-265, 2 Benj. Sales, 1081, 3 Kent, 83.

Tobey stated: Payment; commercial paper taken on account of debt. The note of a debtor or third person does not extinguish antecedent debt, if given for the same, unless it is paid.

Tobey; Duggan, 6 Wash. 593, 36 Am. St. 182, n.; Shepherd, 154 Pa. 149, 35 Am. St. 815, n.; Miller v. Race; McMurray, 30 Mo. 263, 77 Am. Dec. 611-613, n.; Van Stone, 142 U. S. 128, 136, 71 Am. Dec. 347; Welch, 23 Cal. 322; Dayton; Okie (suspension of the right to sue until maturity of the paper is all that results); Goodenow; 2 Benj. Sales, 1081; 2 Sedgk. Dam. 796-798; Carroll, 128 N. Y. 19, 13 L. R. A. 43, n.; National Bk., 44 Minn. 224, 9 L. R. A. 263, n.; Johnston, 27 Or. 251, 50 Am. St. 717, n. *Payment can only be in money unless expressly so agreed.* S. Bank, 97 Mich. 178, 37 Am. St. 332, n.

Receipts may be controlled and explained by oral evidence. Tobey; *Res inter alios.* If "in full," for unliquidated damages, it is otherwise; this is conclusive unless surcharged for fraud. Coon, 8 N. Y. 402, 59 Am. Dec. 502, n., 39 Am. St. 579; Bliss, 160 Mass. 447, 39 Am. St. 504, n.; Bigl. Estop. 471-479, 3 Sm. L. C. 2123, 9th ed.; notes to Bauerman: 48; 2 Sm. L. C. 8th ed.; 1 Beach, Conts. 384.

Merger. Generally one simple executory contract does not extinguish another for which it is substituted, and negotiable securities form no exception, although it is otherwise where a sealed instrument is given. Here the simple contract merges into the specialty. *Omne majus continet in se minus.* The greater contains the less.

Commercial paper only discharges the precedent debt upon express agreement. Creditor may return the bill, note or check when dishonored and proceed upon the original debt. 2 Danl. Nego. 1260; cases; 2 Rand. 750; Byles, Bills, 163; Sto. Prom. Notes, 117; Van Wart, 3 Barn. & Cress. 439, 446 (10 E. C. L. R.); 2 Gr. Ev. 521; Exchange Bank, 7 Colo. 314. See Sard, 1 M. & W. 153; Sibree, 15 M. & W. 23, 71 R. R. 545; stated, notes to Cumber: 311; Tobey, 2 Am. Lead. Cas.; Dayton.

Stranger's note for debt is not payment unless so agreed. Tobey v. Barber, 2 Danl. Nego. Insts., §§ 1259-1271; 1 Pars. N. 180, 187.

Debtor's note for contemporaneous debt is not payment of it without express agreement. 2 Danl. Nego. Insts., § 1261:

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cases: 3 Rand., 1509-1585; Sto. Notes § 104, note quoting 2 Am. Lead. Cas. 263. See 2 Pars. N. 157. If paper is dishonored holder may sue on the original consideration. 2 Danl., § 1261; cases, Ans. Conts. 273. Suspends right to sue, is the only effect of such paper in the absence of express agreement. 2 Danl., 1272, 1274; Okie. Production and surrender of the note may be made and action brought on the original cause of action. 3 Rand. 1581, 1582; 2 Am. Lead. Cas. 275. But suing is an election. Dick, 122 Ind. 277, 7 L. R. A. 590. One simple contract may be substituted for another, yet the former does not merge in the latter unless it is expressly so agreed. 2 Danl. 1260. The rationale here involved is that in Cumber.

Generally taking a note or bill for pre-existing debt is, prima facie, only conditional payment, and the burden is upon the debtor in an action upon the original debt to show that the intention was otherwise. 3 Rand. 1509-1585, 2 Danl. 1261, 2 Pars. N. 157; Sto. Notes, §§ 104, 117, 389, 438, cases; Tobey; Dayton; Phoenix Ins., 11 Mich. 501, Redf. N. & B. 637-642, n.; 1 Add. Conts. 336; Robinson, 67 Vt. 128, 48 Am. St. 807, n., Ans. Conts. 273. Previous debt must be extinguished to constitute holder a bona fide purchaser. *Sub Swift.* But in Maine, Massachusetts (Goodenow), Vermont, Indiana and Louisiana, the presumption is that the paper is taken in absolute payment, if it be negotiable; the presumption, however, may be repelled by proof. 2 Danl. 1260; Descadillas, 8 Greenl. 298; Wiseman, 7 Mass. 286; Spooner, 4 Allen (Mass.), 485; Wait, 31 Vt. 516; Arnold, 34 Vt. 402; Gaskin, 15 Ind. 253; Hunt, 2 La. 109; 2 Benj. Sales, 767. Payment by a debtor obtaining the funds fraudulently, when valid. *Sub* Miller v. Race; *Ex dolo malo*, etc.

Drawing bill or check without funds is a fraud. 2 Danl. 1596, 1629. Holder of such is not charged with duty of diligence. Isley, 2 Met. 168, n., 2 Redf. & Bigl. N. 642. Obtaining property by, is larceny. R. v. Hazelton.

Liability of one receiving payment of a check through a forged indorsement. First Nat. Bank, 182 Mass. 130, 94 Am. St. 637-650, n.

Forged paper. Receiving it as genuine by purported maker operates as payment. Swift: cases. Bank of U. S. v. Bank, Georgia (1825), 10 Wheat. 333, Redf. L. C. N. 650-670, ext. n.: cited, 2 Pars. N. & B., 3 Rand. 1782; 1 Danl.; 1 Page, 1401; Laborde, 4 Rob. (La.) 190, 39 Am. Dec. 517-526, n. Creditor receiving such paper while holding it is charged with due diligence in fixing liabilities of parties. Miller, 8 Watts, 192, 34 Am. Dec. 449-452, n.; Phoenix Ins. Co., 11 Mich. 501, Redf. & L. C. N. 637-642, n.; 2 Rand. 804; 2 Danl. 1278; Dayton; Tobey; Sto. Bills 109; Sto. Notes, 117. And he must show every fact he should to recover upon the instrument as if he were suing upon it. Dayton. And the burden of proof is upon him. Phoenix Ins. Co. Estopped by laches in accepting forged paper by maker as genuine. Bank v. Bank of Georgia, *supra*; 3 Danl. 1782.

The amount paid by a drawee bank upon a forged check to an indorser and holder of it may be recovered from him by the drawee bank. See 2 Page, Conts. 821; People's Bk. v. Franklin Bk., 88 Tenn. 299, 17 Am. St. 884-899, ext. n.,

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6 L. R. A. 724; cases, 2 Danl. Nego. Insts. 1657-1663. *Contra*: Bank U. S. v. Bank Ga., 10 Wheat. 333; Price v. Neal (1762), 3 Burr. 1355.

Debtor giving his own note for contemporaneous transaction is not payment unless it is actually paid. Notes, Tobey, 2 Am. Lead. Cas., 3 Rand. 1543. Third person giving note, same rule. *Qui sentit commodum*, etc. Check delivered stands on same footing as other paper; if not paid after diligence, holder may sue on original consideration. 2 Danl. 1623; 2 Pars. N. & B. 85, 86; 3 Rand. 1562; notes to 39 Am. St. 782; Holmes, 131 Pa. 233, 17 Am. St. 804, n. Stating "payment in full" in a check makes no difference; this does not conclude. Meyer, 21 Ind. App. 138, 69 Am. St. 344, n. Bank bills; payment by. 3 Pars. Notes, 187-199. Payment or sale of paper; distinctions. A sale of commercial paper depends on express agreement. 2 Danl. 1221. Tendering and receiving commercial paper without agreement or intention to sell amounts to payment only, and is not a sale of the paper. 2 Danl. 1222.

Legal tender; payment to be made in what. Legal Tender Cases; 2 Danl., 1244, 1253; Bronson, 7 Wall. 29; Butler, 7 Wall. 258; Trebilcock, 12 Wall. 687; stated, 2 Danl. 1247, n., 1 Rand. 98, n. Note payable in specie only is not payable in currency. "Specie" means gold or silver, nothing else. *Expressio unius*: The express mention of one thing implies the exclusion of another.

Legal Tender Cases. These hold that congress has power to declare what shall be legal tender. Legal Tender Cases; notes, 11 Wall. 682 (Knox v. Lee; Parker), and reported in full in 12 Wall. 457 (1870), re-affirmed in Dooley, 13 Wall. 604, Bigler, 14 Wall. 297; R. R. v. Johnson, 15 Wall. 195; Legal Tender Cases. See these cases reviewed and stated, Miller's Const., pp. 135, 144; Hepburn v. Griswold, 8 Wall. 603 (see interesting remarks on these cases, 2 Danl., 1248; 1 Rand. 98, n., reviewing these cases).

Holder of paper delivered for payment: rights and duties of. 2 Danl. 1275-1278, n. Receiving commercial paper is not payment until paid, without an express agreement. Tobey; Dayton, *supra*. Vendor's lien on land is not affected by taking note. 3 Rand., 1573, 1574; 2 Danl. 1281; 2 Pars. N. 1373; Byles, N. 391. Payment and tender. 2 Benj. Sales, 1054-1116. See TENDER.

Payment of part is not payment of the whole, although that was agreed to. Cumber, 311; Harrison, *sub* PAYMENT; Ans. Conts. 83, 84.

TODD v. FLIGHT (1860), 9 C. B. (N. S.) 378 (99 E. C. L. R.); 6 Mews' E. C. L. 96 Tenn. 163, 34 L. R. A. 619, 22 Am. St. 851, 146 Mass. 49, 4 Am. St. 281, 5 L. R. A. 795, Cool. Torts; Bigl. Lead. Cas.; 1 Bish. C. L. 1095; Gould, Wat., Whart. Neg., Shear, Wood, Nuis.; 82 Wisd. 640, 17 L. R. A. 577; Busw. Pers. Inj.

Landlord and tenant: nuisance; repair of buildings. When landlord and when tenant must repair. Shipley; Pell, 127 N. Y. 381, 12 L. R. A. 843, n. (tenement keeper liable for dangerous furnishings); Pretty, L. R. 8 C. P. 401-405, 15 Rul. Cas. 335; 46 L. R. A. 33-122.

Tarry v. Ashton (1876), 1 Q. B. Div. 314; Mews' E. C. L.; 3 Cent. L. J. 431; Wood, Land. & Ten.; 162 Mass. 333, 44 Am. St. 365, 2 Dill. Corp. 1011.

Apartment houses; liabilities of owners, 95

Todd v. Flight.—

Minn. 279, 111 Am. St. 471, n.; 72 N. J. 263, 111 Am. St. 666.

Dangerous premises, repair of. Generally the occupant of premises must repair them and keep them safe as to third persons. Cork, 162 Mass. 330, 44 Am. St. 362, n., 26 L. R. A. 256; St. Louis R. R., 54 Ark. 209, 12 L. R. A. 189, n. See Indemauro; *Sic utere*, etc.; Shipley v. Fifty Associates (liability of landlord to third persons).

No agreement of landlord and tenant will change their status to the public. Todd, Tarry, and Shipley cases.

TOLL BRIDGES: Rights and duties of proprietors. Clarksville Co., 100 Tenn. 417, 58 L. R. A. 155-170, ext. n.

TOO BROAD: TOO NARROW: Pleadings must not be. Bowles; 100; Pueblo; Kraner; 299. See DEMURRER; Sto. Pl. 443, 846, 857. § 321, Hughes' Proc. (dilatatory pleadings may be).

Nor objections, exceptions, assignments of error, etc. Lough; 293; Montgomery 292.

A general demurrer cannot be too narrow, nor waived. See DEMURRER; *Omne majus*.

A cause of action must be shown against all parties joined, else there is a want of facts. See PARTIES. A plea which does not answer the whole indictment or all of the counts to which it is pleaded is defective. Fox, 89 Md. 381, 75 Am. St. 193, n.

TOOGOOD v. SPYRING (1834), 1 Crompt. M. & R. 181, 4 Tyr. 582, Ames, Torts, 508, Mews' E. C. L., Bigl. Lead. Cas. 139, Cool., Add., 9 Rul. Cas., 40 R. R. 523, New. Def., 3 Suth. Dam. 1209, Bro. Max. 320, 322, Cool. Const. Lim., 2 Wh. Ev. 1262, 2 Gr. 421, 2 Kent, 22, 38 Fla. 249, 56 Am. St. 175.

Defamation; privileged communications. Harrison v. Bush; Bromage. See Pollard; Star Pub. Co. (1904), — Del. —, 65 L. R. A. 980-982; cases.

TOOL CO. v. NORRIS: L.C. 365.

TORTS: Maxims and cases of. Developed from *Juris praecepta*. Burdick, Torts, 3-4. MAXIMS:

Salus populi suprema lex.

Rex non potest peccare (the king—state—can do no wrong).

Sic utere tuo, ut alienum non laedas (Squib Case; Indemauro v. Dames).

Qui primum peccat ille facit rixam (Squib Case; Carter v. Towne; M. K. & T. R. E. v. Wood).

Volenti non fit injuria (Davies v. Mann).

In jure non remota causa, sed proxima spectatur (Squib Case; Gilson v. Delaware Canal Co.; Spies v. P.).

Actus Dei nemini facit injuriam (Blyth v. Birmingham Water Co.; Rodgers. Fletcher v. Rylands; Nichols v. Marsland).

Actio personalis moritur cum persona, & v. (Blyth v. Birmingham Water Works Co.: definition of a tort). See NEGLIGENCE.

One is presumed to intend the natural, direct and probable consequences of his act. Scott (Squib Case); M. K. & T. R. E. v. Wood (allowing contagious diseases to spread); Vosburgh v. Moak.

CASES:

Ashby v. White: 273 (*Ubi jus, ibi remedium*).

Salisbury v. Herschenroder (accident combining with unlawful act is actionable).

Hill v. Boston (liability of a quasi-corporation for torts).

Lange v. Benedict: 159 (superior judicial

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officers have unlimited immunity for their acts).

Crepps v. Durden: 113 (inferior judicial officers are held strictly accountable for their official acts).

Miller v. Hyde (title to property does not pass upon a judgment for conversion).

White v. Fort: 175 (merger of the civil remedy in the criminal was the former rule).

Stephens v. Myers (assault and battery, *q. v.*).

Allen v. Wright: 167 (arrests; when justifiable).

Savacool v. Boughten: 164 (execution of regular process is justifiable).

McCardle v. McGinley (malicious prosecution, *q. v.*).

Scott v. Shepherd (Squib Case), a most instructive and widely cited case. It has many cognate cases cited thereunder, *q. v.* In a general way it illustrates the application of the maxim *Qui primum peccat*, etc. An infant may commit a tort. Intent is no element. See *Actus non facit reum*, etc.)

Gilson v. Delaware Land Co. (able and most extended resume of causation—*In jure non remota*, etc.—privity).

Woodward v. Miller (able and most extended resume of privity; *Thomas v. Winchester*; *Langridge v. Levy*; *Vosburgh v. Moak*—torts arising from contracts; §§ 18, 24, Hughes, Conts.).

Kirkwood v. Miller (joint trespassers; who are. See PRIVACY; *Vosburgh v. Moak*; *Qui sentit commodum*, etc.; *Tyler v. Pomeroy*).

M'Manus v. Crickett (torts of agents; principal, when liable for). *Craker v. R. R.* (corporations liable for acts of employees). *Dixon v. Bell* (principal liable for acts of child agent). *Gilson v. Spear* (infants liable for torts, as adults are. Parents not liable for). *C. v. Neal* (husband liable for torts of wife committed in his presence. See COERCION; *Necessitas inducit privilegium*, etc.). *Krom v. Schoonmaker* (an insane person may commit a tort; intent is no element. An infant may commit a tort. *Behrens*, 23 Ia. 333, 92 Am. St. 428, n. (insane person liable for torts)).

Lumley v. Gye (enticing one to break a contract is actionable. See *Allen v. Flood*; *Mogul*).

Pasley v. Freeman: 375; cases (deceit, fraud, misrepresentation).

Hadley v. Baxendale (breach of contract, remoteness; privity. Contracts and torts are often closely related. §§ 18, 24, Hughes, Conts. See *Langridge v. Levy*; *Thomas v. Winchester*).

Armory v. Delamire: 180 (possession is sufficient against a wrongdoer); *Bull v. Griswold* (a trespasser can take no benefits from his trespass).

Miller v. Horton (destruction of property under statutory powers).

Taylor v. Cole (right of owner to take possession of his property from an unlawful possessor; *Salus populi suprema lex*). *Semayne's Case* (right to break doors to serve process).

Williams v. Esling (right to enter on the lands of another).

May v. Burdett (trespassing animals; owner's liability therefor).

Aldrich v. Wright (destruction of animals in self-defense).

Loomis v. Terry (savage dogs; owner liable for, when).

Tyler v. Pomeroy (liability of public officials for acts done by them in the name of government).

Torts.—

Definition of a tort. A widely approved definition of a tort is Blackstone's definition of a crime (195 U. S. 69), with the word "public" omitted. (See Preface, Hughes, Conts.). Therefore a tort is an act omitted or committed in violation of a law commanding or forbidding it. *Blyth, supra*; *Missouri, K. & T. R. R. v. Wood*; *Ewart, Estop.* 30. § 291, Gr. & Rud.

The above definition is widely accepted, although intent is an element of crime, but not of tort.

Generally: 2 Bouv. 1124; And. Dic. See NEGLIGENCE; NUISANCE; TRESPASS; MALICIOUS ACTS; CONSPIRACY; CIVIL RIGHTS; DEFAMATION; ASSAULT AND BATTERY; *Salus populi*, etc.

Authorities widely vary as to definition and also the true place of the law of torts in the body of the law. 1 Kinhead, Torts, 4, 5.

A voluntary act of omission or of commission causing an injury is actionable. A widely cited case proceeding on this definition is *Blyth*.

It is a failure to do what a reasonable and prudent person ordinarily would have done under the circumstances of the situation, or doing what such a person would not have done. *Blyth Case, supra*; *R. R. v. Jones* (1877), 95 U. S. 439, 24 L. ed. 506; *Bro. Max.* 368; *R. v. Conde*. See JOINT TRESPASSERS.

Acts of omission causing damage are actionable. *Ashby v. White*: 273. If one fails to restrain noxious and dangerous animals or water or fumes he is liable. *Fletcher v. Rylands*, *Missouri, K. & T. R. R. v. Wood*.

An unlawful or negligent act combining with an accident is actionable, thus:—A sign was hung out in violation of law and it was torn loose and hurled by a storm causing damage in its flight. *Held*: actionable. *Salisbury v. Herchenroder*, *Bish. Torts*, 36 Am. St. 819, 820, 18 *Rul. Cas.* 786, *Whart. Neg.*, *Wood, Nuis.*, *Dill. Munic. Corp.*, *Beach, Pub. Corp.*; *Vaughan v. Menlove* (1837), 3 *Bing. N. C.* 468-477, 4 *Scott*, 244, 3 *Hodges*, 51, 18 *Rul. Cas.* 715, n. (spontaneous ignition of hay rick built too near plaintiff's house, actionable); *Smith v. London, L. R.* 6 C. P. 14-23, 18 *Rul. Cas.* 726; *Nelson v. Godfrey* (1850), 12 *Ill.* 20; *Milwaukee R. R. v. Kellogg* (1876), 94 U. S. 469; *Carter v. Towne* (selling eight-year-old boy gunpowder, who injures himself therewith).

An act in violation of law causing damage is actionable. Rule 5, *Moak, Torts*, 36 Am. St. 816-820. Unlawful speed of trains, 38 Am. St. 818. Wrongful acts begetting litigation. See MALICIOUS ACTS; *Ewart, Estop.* 42; *Ferguson v. Kinnoull* (ministerial official acts, *sub Lange*: 159).

Patently defective public works causing damage actionable. *Rochester White Lead Co., sub Hill v. Boston*; *Whart. Neg.* 988; *Shear. & Redf. Neg.* 579. Trains running over stock upon unfenced track and injuring trainmen, actionable. *Archison, T. & S. F. R. R. v. Reesman* (1894), 60 *Fed. Rep.* 370, 23 *L. R. A.* 678, n.

A lawful act does not incur such liabilities; *e. g.* the intermediate throwers of the squib incurred no liability. *Squib Case*; *Loosee*: 210.

Unprecedented cold weather burst carefully laid water-pipes, and for this there was no liability. *Blyth Case*; *Bish. Torts*, 440; *Blythe v. Denver R. R.* (1890), 15 *Colo.* 333, 22 *Am. St.* 403,

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n.; *Nichols v. Marsland*; *Actus Dei nemini facit injuriam*.

Driving on the highway is not negligence, if a runaway results. *Brown v. Collins*, sub *Fletcher v. Rylands*; nor is trying horses, sub *Scott v. Shepherd*.

Torts—trespass, nuisance and wrongs of an *ex delicto* character include a wide range of wrongs, and overlap and intermingle with contracts and crimes to great extents. Citations of *Coggs*: 350, and of *Ashby* (L. C. 273), *Smith, Lead. Cas.*, will well illustrate this most instructive fact, of which we elsewhere observe. §§ 21-26, *Hughes' Conts.*

Torts not committed with force, actual or implied, as for malicious prosecution. See *Id.* Fraud in purchases and sales. *Pasley*: 375; *Chandelor*: 374; *Langridge v. Levy*; *Thomas v. Winchester*. Defamation. See *Pollard v. Lyon*. Conspiracy to defame. See CONSPIRACY. Torts committed forcibly where the matter affected was intangible, as for obstructing a private way or disturbing the plaintiff in the use of a pew. Torts committed forcibly when the injury is consequential merely and not immediate, as special damage from a private nuisance. *St. Helen's Smelting Co. v. Tipping*.

Acts done on the defendant's land, which by immediate consequences injures the plaintiff. *St. Helen's Case*; *Hay v. Cohoes Co.*; *Loose*: 210; *Gilson v. Delaware Canal Co.*

Injuries to the relative rights. Enticing away servants and children. *Lumley*. Seduction of a daughter or servant. See SEDUCTION; *Terry v. Hutchinson*, *supra*; also for debauching a wife. See SEDUCTION. But a wife cannot sue another woman for crim. con. with husband of plaintiff. *Lonstorf*. See *Lynch v. Knight*. For alienation of spouse by husband, see *Lynch v. Knight*: cases.

Injuries resulting from negligence. *Scott v. Shepherd* (Squib Case) and cognate cases; Victorian R. R.: cases. See NEGLIGENCE; *Hay v. Cohoes Co.*; *Gilson v. Delaware Canal Co.*

Wrongful acts done under legal process regularly issuing from a court of competent jurisdiction. *Savacool*: 164; *McCardle v. McGinley*. See MALICIOUS ACTS; PROCESS; *Lange*: 159; *King*. Several injuries from one transaction; all may be joined in one action. See JOINDER OF CAUSES; *Emerson v. Nash*; *King v. Chicago R. R.*

Wrongful acts committed by the defendant's servant without his order, but for which he is responsible. *M'Manus v. Crickett*: cases. Infringement of rights given by statute. See COPYRIGHT. *Ashby v. White* (L. C. 273), *Smith, Lead. Cas.*. Selling an infant noxious agents,—gunpowder with which he injures himself. *Carter v. Towne*, sub *Scott v. Shepherd*.

Explosives; negligent use of. 10 Cyc. 1-19.

Injuries committed to property of which the plaintiff has the reversion only. See LANDLORD AND TENANT; *Armory* (L. C. 180), *Smith, Lead. Cas.*; as where property is in the hands of a bailee. Notes, *Armory*: 180. Bouv. Dic.: CASE; EASEMENTS.

Remoteness; privity; causation is one of the great principles of law, and it is comprehended alike in contracts and in torts. Bro. Max. 228. *Hadley*; *Langridge v. Levy*; *Thomas v. Winchester*; *Scott v. Shepherd* (Squib Case); *Gilson v. Dela-*

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ware Canal Co.: In *jure non remota*; *Woodward v. Miller*.

Intent as an element in crime places more restriction upon this maxim than is found in torts or contracts. *Spies v. P.*: cases.

Torts and kindred subjects. Many of the great discussions of tort disclose the fact that they involve a fundamental conception of contracts and often of criminal law. See Preface, *Hughes' Conts.*; *Tyler v. Pomeroy*. There must be kept in view the primal covenants among men when they first entered society, for protection and due process of law (*Sic utere tuo*, etc.), and for all that relates to *Salus populi suprema lex*.

A part of this maxim is an obligation attending the discussion of *Sic utere tuo ut alienum non ladas* (So use your own property as not to injure another's). And accordingly it is held a violation of that obligation for one to bring or keep a noxious element or a dangerous thing upon his premises and allow it to escape or injure another; e. g., water, *Fletcher v. Rylands*: 1 Thomp. Cas. Neg. 1-116 ext. n.; *Nichols v. Marsland* (when an accident will excuse); or animals, *May v. Burdett*; or fumes to escape from chimneys, *St. Helen's Smelting Co. v. Tipping*; or to set a dangerous thing in motion, *Squib Case*, *Thomas v. Winchester*; *Langridge v. Levy*; *Hay v. Cohoes Co.* (blasting rock); to allow one infected with a contagion to escape from a hospital, *Missouri, K. & T. R. R. v. Wood*; or to keep dangerous premises, *Indemaur v. Dames*; *Heaven v. Pender*. See also *Ashby*: 273; *Lumley*, *Lynch v. Knight*; *Terry v. Hutchinson*. The latter is a seduction case, and involves a wrong that affects a contract tie between two, that is impaired by the act of a third, which constitutes a tort. In such cases an implied contract is the basis of the tort, and we must know the contract in order to know the tort. See §§ 21, 22, *Hughes, Conts.*; Preface to *Bishop's New Crim. Law*, p. vi. *Coggs v. Bernard*: 350; *Railway v. Lockwood*: 351; *Holister v. Nowlen*: 354; § 18, *Hughes, Conts.*, and maxims there cited. Many of the great cases on torts are also discussed in contracts, and *e converso*. See also *Squib Case*.

TRACY v. TALMAGE (1856), 14 N. Y. 162, 67 Am. Dec. 132. Cited, § 89, *Hughes, Conts.*

Contracts tainted with illegality cannot be enforced. See *Holman*: 363; *Beaumont*: 367: cases. (Jurisdiction does not attach to illegality.) In *pari delicto*, etc.

TRADE-MARKS: 2 Bouv. 1127-1131, And. Dic. 1044-1046, 3 Suth. Dam. 1200, 1201; *Hopkins, Unfair Trade*; *Marsh v. Billings* (1851), 7 Cush. 322, Bigl. Ld. Cas. Torts; *Sykes v. Sykes*, 3 B. & C. 541 (E. C. L. R.), Bigl. Ld. Cas. Torts, Cool., Bish., Moak, Add.; 2 Pars. Conts. 354-364, 9 Am. St. 282, 331, n., 2 High. Injunc. 1063-1105; 68 Am. St. 469, n.; *Kyle*, 127 Ala. 39, 28 So. 545, 85 Am. St. 78-125, ext. n. (what words or phrases constitute trade-marks). Forms of bills and answers. *Hopkins, Unfair Trade*, 342-370.

Trade secrets are protected. *Beach Inj.* 35; 924-926. The trade secret must really and truly be such. *Hopkins, Unfair Trade*, 158.

- TRANSIT TERRA CUM ONERE:** The land passes with its burden. Bro. Max. 495, 706. Encumbrances follow the land. *Accessorium, etc.*
- TRANSITORY:** What actions are. See *VENUE*; *Mostyn*: 274.
- TRAPNALL v. McAFEE** (1860), 3 Met. (Ky.) 34, 77 Am. Dec. 152-160, n. (attachment and injunction bonds; liability); Burton, 14 Ia. 196, 81 Am. Dec. 465-480, n.; Tisdale, 106 Ia. 1, 68 Am. St. 263-280, ext. n. (malicious attachments); Kyd, 56 Neb. 71, 71 Am. St. 661, n. (malicious attachment). See *MALICIOUS ACTS*. Injunction bond; damages may be determined in the principal suit. Carpenter, 68 N. H. 486, 75 Am. St. 616. See *Cobbey*, *Replev.* (*replevin bonds*).
- TRAVELERS:** Carrying weapons. McClain, C. L. 1036.
- TRAVELERS' INS. CO. v. JONES** (1888), 90 Ga. 541, 12 Am. St. 270, n., 40 L. R. A. 270, n., 40 L. R. A. 432-452, ext. n.
What is exposure to danger in insurance law. See *SUICIDE*. Proximate and remote cause in insurance cases. 36 Am. St. 852-861, ext. n.; Cornwell, 6 N. Dak. 201, 66 Am. St. 661, 40 L. R. A. 436, n. See *Ionides Case*.
- TRAVELING ON SUNDAY:** Legality of. McClain, C. L. 1532. See *SUNDAY*; *Sutton*.
- TRAVERSE:** 2 Bouv. Dic. 1134. See *DENIAL*; *And. Dic.*
- TREASON:** 2 Bouv., *And. Dic.*, 3 Gr. Ev. 237-248, 2 Bish. Cr. Proc. 1030-1041; U. S. v. Hoxie; McClain, C. L. 1354-1358.
- TREATY:** 2 Bouv. Dic. 1136. Is construed by Civil Law. § 139, Gr. & Rud.
- TRESPASS:** 2 Bouv. 1138, *And. Dic.*, 2 Gr. Ev. 612-635, 3 Suth. Dam. 1008-1107, 1 Chit. Pl. 186-209, 16th Am. ed., 1 Wat. Tres. 515-629, 1 Add. Torts, 466-543. See *TORTS*; *NUISANCE*; *NEGLIGENCE*; *ASSAULT AND BATTERY*; *DAMAGES*; *Volenti non fit injuria*.
- As an element of crime. McClain, C. L., q. v.
- Criminal trespass*; belief of right to enter. McClain, C. L. 113, n.; S. v. Holmes. Under mistake of ownership. McClain, C. L. 135.
- Resistance to entry; when lawful.* McClain, C. L. 142; Bird v. Holbrook; Hooker v. Miller; Aldrich v. Wright. Not sufficient to constitute provocation for manslaughter. McClain, C. L. 338.
- Continuous trespass in larceny.* McClain, C. L. 551-553. By reason of subsequent wrongful act. McClain, C. L. 570; Six Carpenters: 165.
- As distinguishing larceny from embezzlement. McClain, C. L. 623.
- Willful.* McClain, C. L. 831-835. After warning. McClain, C. L. 824.
- Necessity a justification for.* Campbell v. Race.
- TRESPASSEE:** Cannot take advantage of his own wrong. Bull v. Griswold; Bright v. Boyd.
- Death of, from unnecessary violence in resisting, manslaughter.* McClain, C. L. 347.
- Ejection of, when lawful.* McClain, C. L. 245; Taylor v. Cole.
- TRESPASSEE AB INITIO:** 2 Bouv. Dic. Officer failing to return his process is. Six Carpenters' Case: 165. Who abuses it. Malcom; Barrett. Possession; when essential to maintain trespass. Armory: 180, n.; Sm. L. Cas.; Bro. Max. 128.
- TRESPASSING ANIMALS:** Aldrich v. Wright.
- TRESPASS TO TRY TITLE:** Judgment in, is not *res adjudicata*. Moore, 98 Tex. 16, 107 Am. St. 598-607, n.
- TREVIVAN v. LAWRENCE** (*Estoppel of record—res adjudicata*; the last estoppel binds): L.C. 78.
- TRIAL:** 2 Bouv. Dic. 1141; *Triatio ibi semper debet fieri, ubi juratores meliorem possunt habere notitiam*: Trial ought always to be had where the jury can have the best knowledge. 7 Coke, 1.
- TRIPLETT v. ALLEN** (1875), 26 Gr. (Va.) 721, 21 Am. Rep. 320. Rescission of contract for mistake. Whitworth v. Thomas; § 116, Hughes' Conts.
- TRIST v. CHILD:** L.C. 214 (*Construction*; morals interpreted into compacts. Oakley v. Aspinwall; P. v. Turner).
- TROVER:** 2 Bouv.; *And. Dic.*; 2 Gr. Ev. 636-649; 3 Suth. Dam. 1108-1142; 1 Chit. Pl. 164-181, 16th Am. Ed.
- When title passes in action of.* Miller v. Hyde. § 137, Hughes' Proc.
- TRUE:** Pleadings must be. Steph. Pl. 384; 1 Chit. Pl. 567, 574; Graver v. Faurot: 103; Myers v. Erwin: 150; Crepps v. Durden: 113. *Fabula non judicium*. Cf. Rensberger v. Britton. § 22, Hughes' Proc.
- Rationale demanding.* See *SHAM PLEADINGS*; Bro. Max. 326, n., 342, 971; Weltmer: 268a; *JURISDICTION*.
- Denials must be true.* Dickson: 34; Graver: 103. See *DENIALS*. Denials upon information and belief call for true pleadings. Graver: 103; Humphreys: 38.
- Every plea must be capable of proof.* Graver: 103.
- Inconsistent denials not allowed.* Dickson: 34; Crater v. McCormick.
- May plead "as many defenses as he may have," is the language of the code. Graver: 103; Bell v. Brown.
- Pleas; answers must be true.* P. v. McCumber: 110; Graver: 103; Myers v. Erwin: 150; Bliss, Code Pl. 343, 344.
- Equity demands true pleadings.* Graver: 103. And so do codes. Graver; P. v. McCumber: 110.
- The conserving principles of procedure are best served by true and certain pleadings.* Pain: 107. §§ 1-12, Hughes' Proc.
- TRUEMAN v. FENTON** (1777), Cowp. 544, 2 Sm. L. Cas. 1455; 1 id. 148, 149, 11th ed. (reviewing English cases): cited, Pars. Conts., Chit., Ham. 328, Hughes' Conts., § 76.
- A debt barred by bankruptcy may be revived by an express promise to pay.* 1 Pars. Conts. 445. And likewise a debt barred by the statute of limitations. 3 Pars. Conts. 68, Ans. 100. See *LIMITATIONS*. An equitable consideration will support an express promise to pay. Lamplough: 301; cases.
- This case is widely cited to illustrate what is a continuing consideration. See Lamplough: 301.
- TRUSTS AND TRUSTEES:** Equity has jurisdiction of. Harrigan, *sub MAGNA*.
- Trustee cannot speculate in trust funds.* Keech; Michoud; Boyd.
- Liability of, for deposits in bank.* Officer, 120 Ia. 389, 98 Am. St. 365-377, n.
- Public trustee; contracts with.* Sub Keech.
- Resulting trusts.* 2 Bouv. 914, 915. Commercial trusts. *And. Dic.* 1061. Precatory trust. Harding v. Glynn; Post, 181 N. Y. 5, 106 Am. St. 495-531, ext. n.
- Deed to one purchaser, money paid by another.* 3 Dev. Deeds, 1148-1190.
- Distribution of a trust.* Eakle (1904), 142 Cal. 15, 100 Am. St. 99-107.
- Trustee of property custodia legis must have power from court to sell.* Hitz, 185 U. S. 155.

Trusts and Trustees.—

Parol trusts in land. Insurance, 116 Tenn. 1, 115 Am. St. 798, ext. n.
What forbidden. Estate of Fair (1901), 132 Cal. 523, 64 Pac. 1000, 84 Am. St. 70.

Generally: 2 Bouv. 1144, 1145; And. Dic. **TRUXTON v. FAIT CO.** (1899), 1 Pennwille (Del.), 493, 73 Am. St. 81-106, ext. n. (*Stare decisis.* See *Id.*)

TUCKER v. MORELAND: See Craig; INFANTS; 21 Cyc. 1144. *Cited*, § 55, Hughes' Conts.

TUFF v. WARMAN (1858), 2 C. B. (N. S.) 740 (89 E. C. L. R.), 5 C. B. (N. S.) 573 (94 E. C. L. R.), 19 Rul. Cas. 184-207; notes, Butterfield v. Forrester; Davies v. Mann; Howe's Civil Law, 300, 134 F. R. 161, 69 L. R. A. 293.

Contributory negligence. "A person is not entitled to say that he is injured by the negligence of another if he might by the use of ordinary care have escaped the damage. But although a plaintiff has brought himself into danger by negligence, if the defendant could by ordinary care have averted the danger he is liable." 19 Rul. Cas. 189; Davies; Butterfield; U. P. R. v. Cappelier.

TULLETT v. ARMSTRONG (1839), 1 Beavan, 1, 48 Eng. Reprint, 838, 4 Beavan, 319, 4 Myln. & Cr. 377, 41 Eng. Reprint, 147, 152, Laws. Lead. Eq. Cas. 80; 100 Va. 176, 93 Am. St. 950; Gr. Pub. Pol. 620, Bro. Max. 454; Pars. Conts., Chit.; 2 Kent, 170, n., Sto. Eq., Pom., Adams; Perry, Trusts; Mews' E. C. L. *Restraints upon alienation.* Lowe v. Peers, 100 Va. 175, 93 Am. St. 949; Co. Litt. 223a.

Married women; rights of, to separate estates. Ellibank; Murray, W. & T. Lead. Eq. Cas.; Kirkpatrick, 21 Ark. 268, 76 Am. Dec. 363, ext. n. *Cited*, § 158, Hughes' Proc. Conditions against creditors and alienation void. See SPEND-THrift TRUSTS. A life tenant can alienate. Gray, Rest. of Alienation, 134, 138; 100 Va. 177, 93 Am. St. 951.

TURNER v. BARR (1888), 75 Ia. 758 (dissenting opinion), Church, Habeas Corpus, 364, 365 (what are nullities and what irregularities); Lowery, 103 Ind. 440, 5 Am. Cr. R. 273. *Cited*, §§ 31, 39, 51, 52, 53, 65, 67, 72, 89, 101, 126, Hughes' Proc.; §§ 169, 241, Gr. & Rud.

Court directing a verdict in a criminal case is an irregularity which is not reviewable upon collateral attack or habeas corpus. Church, Hab. Corp. 364, 365. This is the strict rule. *Contra:* Windsor: 1. See *Audi alteram partem*; *Ad questionem facti*, etc.; Max. No. 5, Hughes' Proc.; Schick v. U. S.; S. v. Smith (1903), 138 Ala. 111, 100 Am. St. 26-39, ext. n. (habeas corpus for insufficient evidence). *Jurisdiction, if abused, is lost.* It consists of four elements. The pleadings limit. Church, Hab. Corp. 368; Windsor: 1. See *Ad damnum*; JURISDICTION; Fraaman, 97 Am. St. 650 (sub Windsor: 1) (it consists of three elements).

On principle, grave error shown from the mandatory record is open to collateral attack; it can not be waived or condoned; it needs no objection or exception or aid from the statutory record. See ABATEMENT; Windsor: 1.

What one can not stipulate for, if disregarded by the court, is fundamental error. See INTRODUCTION.

The command of constitutions for a jury to try involves the division of state power, a high policy. That the jury rightly tried

Turney v. Barr.—

a matter solely confided to it should appear from the mandator, record. This is another conserving principle. The functions of that record are encroached upon and diminished when fundamental error shown by it must above and beyond be objected to, excepted to, and both of these be further made technically to appear from the statutory record; and further, to make these available, an assignment of error is indispensable. See §§ 9-12, Hughes' Proc.

Where one can not waive a jury trial expressly, it is absurd to hold he can tacitly. But this is what is held where he must object, except and keep these available by all the technical requirements of the statutory record.

Such encroachments upon the mandatory record, the division of state power, due process of law and constitutional command, illustrate how organic changes are made by recondite means. *Cujus est instituere.* See CONSTITUTIONALISM.

The importance of the question in *Turney* can be seen from this view: In some states all fines for crimes and costs of conviction thereof are a lien against the convict's property. Now suppose the record showed that, instead of the jury trying, the judge had directed a verdict of guilty, or had tried the case himself. How would such fact affect the lien, or sales or deeds to property issuing therefrom?

In this connection it may be well to ask what would be the effect of omitting material allegations from the indictments, as in *Cruikshank*: 232, upon such liens, sales, deeds and titles? See LITERATURE; Beaumont: 367; Rensberger.

TURNER v. S. (1847), 8 Smedes & Marsh. (Miss.) 104, 47 Am. Dec. 74-85, n.

Leading questions. 1 Gr. Ev. 434, 435.

TURNABLE CASES: *Sub* Scott v. Shepherd. The law of, is limited to. Harris, 38 Wash. 331, 107 Am. St. 847; Pannill, 105 Va. 226, 4 L. R. A. (N. S.) 80-87, ext. n.; Walker, 105 Va. 226, 115 Am. St. 871 (disapproved).

TURPIS EST PARS QUAE NON COMVENIT cum suo toto: That part is bad which accords not with its whole. Plowd. 161.

TURPITUDE: See *Allegans suam turpitudinem*, etc., or *Nemo allegans*, etc.; And. Dic. 1064.

TWINE'S CASE (1601), 3 Coke, 80, 1 Smith, Lead. Cas. 1-80; Williston, Cas. Sales, 486, 3 Gray Cas. Prop. 196; Mews' E. C. L., 46 Mo. App. 97, Bro. Max. 288, 289, 570, Chit., Pars., Add., 1 Benj. Sales, 63, 2 Pom. Eq. 968, 1 Sto. Blsph., Adams, 2 Kent, 516, 10 Rul. Cas. 494, 1 Cob. Replev. 220-223, q. v. 2 Pars. N. & B. 45, Gr. Pub. Pol., 2 Perry, Trusts, 500, Freeman, Ex. 136-143. See FRAUDS AND PERJURIES, Brown, Jurisdic.; Mech. Sales; 20 Cyc. 555-572.

Cited, Hughes' Conts.; also §§ 184, 326, Hughes' Proc.

Twyne's Case stated: Pierce was a debtor of Twyne and C. of £400 and £200, respectively. C. sued him, and pending proceedings P. gave T. a secret conveyance of everything he had, but P. remained in possession of the property and treated it as absolute owner. C. finally got execution and was proceeding to levy it when T. interposed and claimed all the property, and in proof of his assertion produced the secret deed of conveyance. A

Twyne's Case.—

statute had been passed (13 Eliz. ch. 5) making all gifts for the purpose of cheating creditors void, and under this, *held*:

1. It was impossible that anybody could really be so generous as P. had proposed to be. He had given away everything he had in the world, even to the boots he was wearing. Such self-denial could only be the cloak of fraud.

2. In spite of his parade of liberality, P. did not let one of his things go, but used them all just as if they were his own, thereby obtaining a fictitious credit in the world.

3. Then, if there was no fraud, why was there so much mystery about it? Why was not the gift made openly?

4. The gift was made, too, when C. had already commenced an action, and evidently meant business.

5. There was a trust between the parties, and trust was only another name for fraud.

6. The deed alleged that the gift was made "honestly, truly and bona fide," and that was a very suspicious circumstance in itself. ("Self-praise is half disgrace.")

7. Generalities in expression were largely dealt in. ("Fraud lurks in glittering generalities.")

Fraudulent conveyances; leading rules of badges of fraud; Twyne's Case. A debtor may prefer a creditor if he does it honestly. 2 Sto. Eq. 1036; Kitchen, 150 Pa. 376, 30 Am. St. 811, n.; Ryall v. Rowles: 397; Lead. Eq. Cas.; Hancock, 107 N. C. 9, 11 L. R. A. 467. Indeed, *Twyne's Case* stands for this proposition; for it was the attending facts that vitiated. If one could not prefer a creditor, then why discuss the various points and the manner in which it was done?

Twyne's deed declared upon its face that it was an honest deed, but the self-commendation was taken by Coke to be a badge of fraud.

Possession; notice from. Williamson v. Brown; Shauer, 151 U. S. 607, 38 L. ed. 286; cases; Bigl. Fraud, 294; 2 Kent, 515-532.

Frauds on creditors. Bigl. Fraud; Statutes, etc., 517-536; Bish. Conts. 1200-1213; 1 Benj. Sales, 733-783; Add. Conts. (Morgan's ed.).

Sales and conveyances without delivery of possession. 18 Am. Law Reg. (N. S.) 137-153; *Twyne's Case*; Smith, L. C. (this is often regulated by statute).

TYLER v. POMEROY (1864), 8 Allen, 480-506. *Cited*, §§ 48, 61, 268, Gr. & Rud.

Tyler stated: On July 2, 1862, President Lincoln called for 300,000 volunteers from the loyal states. Patriotic selectmen of townships exerted themselves in the name of the towns, but these had no authority in law to act; therefore what they did in that relation was *ultra vires* and void. However, the town of Washington paid T. a bounty for his promise to enlist, and he made an arrangement with a justice of the peace to act as stakeholder of the money to insure T.'s performance. He also signed a contract promising to perform for the money. But

Tyler v. Pomeroy.—

before he was examined and accepted or placed upon a government pay roll or legally entitled to any pay from the government he backed out and refused to enlist. For this the selectmen ordered a constable to arrest T. and confine him in camp until the regiment he was designed for was ordered to the front. He then sued the constable and all the individuals concerned as joint trespassers (*Kirkwood*). As the basis of his right to recover were discussed the limitations of the town, the selectmen and the validity of the contract (*Stetson*: 163). From the contract all was reasoned. The division of state power was discussed, also *Fisher v. McGirr* and *Luther v. Borden*, and the laws of peace and war. In *republica maxime conservanda sunt jura belli* was cited.

This case well illustrates the entirety of the law. The vote of the town to imprison T. was *ultra vires*. This record was no justification for the constable and those acting under it. It was *coram non judice*. *Virginia Coupon Cases*. The contract was not consummated (*White*: 303). It was unilateral (*Cooke v. Oxley*: 321). *Held*, T. could recover.

Government corporations cannot authorize trespass. They are liable only when made so by statute. *Hill v. Boston*; *Virginia C. C.*: 285a; *Loan Assn. v. Topeka*.

The study of procedure is a study of government. *Blake*; *Virginia*: 285a; *U. S. v. Cruikshank*: 232.

TYNAN v. WALKER (1868), 35 Cal. 634, 95 Am. Dec. 152. Defective denials waived by offering proof and not aptly objecting. *Tynan*; *Gale*, 11 Colo. 540. Sham and irrelevant denials may be stricken on motion. *Tynan*; *P. v. McCumber*: 110.

UBI DAMNA DANTUR, VICTUS VICTORI in expensis condemnari debet: Where damages are given, the losing party should be adjudged to pay the costs of the victor. *See Costs*.

UBI EADEM RATIO, UBI IDEM JUS: Like reason makes like law; or, where there is the same reason there is the same law. *Bro. Max.* 153-159; *S. v. Moore*: 222a; *Master*.

Cited, §§ 10, 16, 29, 43, 45, 79, 98, 101, 157, 166, 173, *Hughes' Proc.*; §§ 116, 124, 229, *Gr. & Rud.*

A borrowed statute will be construed as it is in the country from whence it is borrowed. *S. v. Moore*; *Lamberton v. Grant* (1901), 94 Me. 508, 48 Atl. 127, 80 Am. St. 415, n.; cases; *Fay's Estate*.

This rule is founded upon common sense, and the presumption that the legislature viewed with approval the law and its operation in another country. *Verba intentione*.

The disrespect shown this rule in several states has made of the code a curse instead of a blessing. *Benedicta est crospositio*. *See Dovaston*: 217; *J'Anson*: 91; *LITERATURE*.

The above rule should be insisted upon for stability of law, and for the greatest progress in determining what is the law under a statute. §§ 145a, 150, *Hughes' Conts.* *Concordare leges legibus*, etc.; *End. Stat.* 182. *See SUNDAY*.

UBI JUS, UBI REMEDIUM: Where there is a right there is a remedy. *Bro. Max.* 191-212; 1 *Laws of Eng.* 7-10.

Cited, p. 8, §§ 55, 56, 126, 246, 344, *Hughes' Proc.*; §§ 3, 13, 21, 40, 46, 53, 62, 82,

Ubi Jus.—

151, 183, 211, 257, 265, 267, 268, Gr. & Rud.

COGNATE MAXIMS AND CASES:

Necessitas inducit privilegium, quoad jura privata. See **NECESSITY**; **SELF-DEFENSE**.

Legibus sumptis desinentibus, lege naturæ utendum est: When laws imposed by the state fail, we must act by the law of nature. *Salus populi suprema lex.* See **GOVERNMENT**; **CONSTITUTIONAL LAW**; **CIVIL RIGHTS**; **REMEDY**.

Ashby: 273 (there is no wrong without a remedy), *S. P. Marbury*: 142 (this maxim lies at the root of government. In other words, it is a part of the preamble of the constitution of the United States, also of **MAGNA CHARTA**), *S. P., Edwards*: 286.

Dash v. Van Kleeck (protection of rights a primal duty of government). See *Rex non potest peccare*.

Lynch v. Knight; *Winsmore*; *Lumley v. Gye* (instructive applications of the maxim).

Sasportas v. Jennings; *Williams v. Bayley* (duress as a defense has been greatly enlarged by the application of this maxim).

Dority (wife may enjoin spendthrift husband from wasting her estate, independent of divorce proceedings).

Brown v. Swineford: 181; *Cleveland R. R. v. Pritchard*; *NEW TRIAL* (abusive argument and misconduct of counsel is a ground for new trial).

Windsor v. McVeigh: 1; *McAfee v. Reynolds*; *Munday v. Vail*: 79 (disregard of fundamental right when shown from the mandatory record needs no objection, exception, or statutory record. A review court will *sua sponte* notice and correct such error).

There are many rights without remedy. The vicious father with wealth is convicted and sent to the penitentiary for ravishing his infant daughter, but she has no cause of action against him for the damages; if dying, he could cut her off from participating in his estate, thus leaving her the victim of the profoundest injury and penniless besides. The child has no remedy against the parent for tort. Roller. This rule results from considerations of *Salus populi suprema lex*.

The maxim, *Rex non potest peccare*, bars all remedies against the state. Sovereignty can only be sued with its consent; unless that is given its wrongs go unredressed. And only in the particular matter to which it assents can it be summoned, e. g., the federal government consents to be sued in *ex contractu* matters but not *ex delicto*. Therefore the statement of the cause of action must describe an *ex contractu* cause. *Smoot's Case* (here is a case wherein pleadings must describe and truly describe; where pleadings cannot be waived as errorists have contended). See **VARIANCE**.

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In Illinois *Rex non potest peccare* is applied to its fullest extent. *P. v. Dulaney*, 96 Ill. 304. In that state if its military saw fit to dispossess and hold or unlawfully hold over any real estate or other property, the owner would be without any remedy whatever. The petition of right, available in England, is not established in America, it is said.

Accordingly it seems that *Ubi jus*, etc., is a maxim of greater limitations than its expression indicates. Like other maxims, also cases, it has many exceptions, denials and modifications; however it is a manifest hardship and injustice to deny it in the cases above instanced. Such exceptions are a strong argument for the universality of *Ubi jus*.

The action on the case is developed from and around this maxim. See **REMEDY**; *Bouv. Dic.* 871; *Squib Case*. See **EQUITY**; **MAXIMS**.

Importance of this maxim. *Ashby*: 273; *Marbury*: 142.

Civil liberty depends on this maxim. *Marbury*: 142. See **GOVERNMENT**; **REMEDY**.

Consider with this maxim what is suggested pertaining to *White v. Fort*: 175; *Dimes*: 176; **EQUITY**; **MAXIMS**.

UBI JUS INCERTUM, UBI JUS NULLUM: Where the law is uncertain there is no law. 1 Kent, 520. §§ 21, 37, 71, 122, 146, 214a, *Hughes' Proc.*; §§ 76, 110, 182, Gr. & Rud.

COGNATE MAXIMS: *Lex est misera ubi jus est vagum, q. v.*; *Melius est jus deficiens quam jus incertum*; *Incerta pro nullis habentur*; *Omnis innovatio plus novitate perturbat quam utilitate prodest*; *Cursus curiæ est lex curiæ*. See *Stare Decisis*; **GOVERNMENT**: **DUE PROCESS OF LAW RECORD**; *Dovaston*: 217; *Cujus est instituere ejus est abrogare*; **LITERATURE**; *Jus nec inflecti*, etc.; *Hughes' Proc.*

Where official reports cannot be depended on, where the rule is alternating, as antipathy or affection, caprice or whim dictates, there is no law. And so it is where for one the foundation for a judgment must be one kind of matter, and for another a different; where for one there must be allegations and proofs, and for another anything, even palpably sham and false statements; where the conserving principles of procedure are strictly respected on the one hand and are ruinously upset on the other. *Verba intentione debent inservire*. See **INTRODUCTION**; **LITERATURE**; *Hughes' Proc.*; **THEORY OF THE CASE**.

If course and distance could not be uniformly reckoned from heavily bodied the perils of ocean and desert travel would be greatly increased.

Ubi Jus.—

And so it is in jurisprudence. Its value depends on a fixed and uniform rule of action. Upon this depends the value of precedent. Where this is of no value, the publication of official reports of decisions of courts should cease. To publish useless and confusing decisions is not only a great reflection upon supreme courts but is imposition and wrong upon the governed as well. It is an abuse of power in high places, which all history shows is sooner or later resented from low places. *Ubi non adest, etc.*; Hughes' Proc. § 123, Gr. & Rud.

To illustrate it is observed that if water at one time would extinguish a fire and at another would spread a conflagration; if it on one day would bring life and on the next death, its value would be destroyed. And likewise it may be of steel, if here it had the property of cohesion and there that of sand or gas; if here it was lead, there iron, and yonder vegetable. And so it is in language when words have no fixed meaning, and analogously so it is in procedure where the mandatory record is not comprehended and where the statutory record is substituted for it. See LITERATURE; MAXIMS; VARIANCE; THEORY OF THE CASE. To mistake the moon for the sun in nautical and astronomical calculations would result in a mass of illusions, a climax of absurdities. Such a mistake would bring condemnation upon such an assumed astronomer and an early wreck to such a navigator. And so it is with those who abuse and destroy jurisprudence.

Those who rule in disregard of obligation and reason may be likened to the sailor who bores a hole in the ship upon which the safety of all depends. *Si a jure discedas, vagus eris et erunt omnia omnibus incerta.*

UNELFELDER v. LEVY (1858), 9 Cal. 607, 815. S. P. Cohens; Northern Bk. Opinions are restrained within the record from which they emanate and upon which they depend.

ULTRA VIRES: See EXCESS OF JURISDICTION; USURPATION.

Contracts void for. Mutual Guaranty, 107 Ia. 143, 70 Am. St. 149-180, ext. n., Zane, Banks, 33-36; Merchants' Bk.; White, 66 S. C. 491, 97 Am. St. 203, n.; 2 Bouv. Dic. 1153-1155; And. Dic., Ans. Conts. 114, 115, 190; 3 Page, 1053-1054, 1082, 1097; Tyler v. Pomeroy; Virginia: 285a; Cook, Corp. 667-703. §§ 88, 306, Hughes' Proc.

Ultra Vires.—

Corporations cannot set up their own default. Phoenix Ins. Co., 134 Ind. 215, 20 L. R. A. 405-411; Hitchcock v. Galveston; 2 Beach, Conts. 1156, 1165, 1167. Must be pleaded. *Id.* Municipal bonds void for. Beard v. Hopkinsville; Hitchcock; Loan Assn.

Cannot be ratified. Ans. Conts. 337, 338. Capacity of corporations to take and hold realty. Page v. Heineberg. Public officials exceeding their powers are guilty of usurpation. See *Id.*; Tyler.

Corporate acts void for. Whart. Conts. 130-143. County using goods must pay for them. Auerbach, 23 Utah, 105, 90 Am. St. 685, n. A county can not ratify the unauthorized acts of its agents, which are beyond the scope of its corporate powers. Juneau Co., 109 Wis. 330-335; *stated*, Froehlich, sub Loan Assn., 99 Am. St. 988. *Quod ab initio non valet intractu temporis non convalescit.* Thomas v. R. R.

Corporations accepting benefits cannot raise the defense of ultra vires. Thomas v. R. R.; The National Bldg., 181 Ill. 35; Stacy, 223 Ill. 546.

UNA PERSONA VIX POTEST SUPPLERE VICES DUARUM: One person can scarcely supply the place of two. 4 Coke, 118; DIVISION OF STATE POWER.

UNCERTAINTY: In proposal or acceptance prevents the formation of contract. Ans. Conts. 19. See CERTAINTY; Sherman v. Kittsmiller: 305: cases.

Of consideration avoids promise. Ans. Conts. 81, 82.

UNDUE INFLUENCE: 2 Bouv. Dic. 1157. See Chesterfield; Huguenin. Renders a contract voidable. 3 Page, 201-243. § 58, Hughes' Conts. *Wills affecting.* Mallow, 115 Ia. 238, 91 Am. St. 158, n.; 9 Cyc. 454-462.

UNIFORM: Laws will be construed for uniformity and general operation. Goodrich; Suth. Stat. 289; End. Stat. 182; Silberman, 59 Ohio, 582, 44 L. R. A. 264. See CONSTITUTIONAL LAW.

General law. 1 Bouv. Dic. 877.

UNILATERAL CONTRACT: Cooke: 321.

UNION BANK OF RICHMOND v. COMMISSIONERS OF OXFORD (1896), 119 N. C. 214, 34 L. R. A. 487. § 198, Hughes' Proc.

Constitutional requirements for the passage of an act are mandatory. And legislative journals must show this. Post v. Kendall County. See LEGISLATIVE JOURNALS.

UNION PACIFIC R. R. v. CARRIER (1903), 66 Kans. 649, 69 L. R. A. 513-556, ext. n.

Care due to sick, infirm, disabled and otherwise helpless persons with whom no contract relation is sustained. Volenti non fit injuria. An injured person causing his own injury has no claims whatever against him in whose hands is the instrument with which the injury is inflicted. There is due the disabled or injured person no duty whatever, not even of humane care or treatment: *Contra* cases. One cannot charge to another his self-inflicted misfortunes.

Negligence is the omission or negligent discharge of legal duties only which come within the sphere of juridical cognizance. No duty whatever is due trespassers whose negligence is the proximate cause of their injury. One cannot charge the conse-

Union Pac. R. R. v. Cappier.—

quences of his own fault to others; he is in his own keeping, not his brother's.

Duty of persons inflicting injury to care for those injured. Obligation to prevent aggravation of injury. N. 69 L. R. A. 533; Cool. Torts, 79; Isbell v. R. R., 27 Conn. 393, 71 Am. Dec. 78. Duty to report accident. 69 L. R. A. 534.

UNION PACIFIC R. R. v. DODGE County. See VOLUNTARY PAYMENTS.

UNION TRUST CO. v. FRESTON (1904), 136 Mich. 460, 99 N. W. 399, 112 Am. St. 370-384.

Statute; forbidden contract. Bona fide purchaser. A statute forbade the certification of checks unless the drawer had funds. The bona fide purchaser of a check may recover a check drawn in violation of that statute. It did not declare the contract void as to a bona fide purchaser, who is unaffected by the illegality and immorality of the transaction between antecedent parties. A contract may gain vitality from circulation. See BONA FIDES; *Lex non exerce.*

Statutes, how construed; things implied need not be mentioned. 2 Suth. Stat. 334, quoted and followed as good. *Verba intentione*, etc.

UNITED STATES: 2 Bouv. Dic. See FEDERAL GOVERNMENT.

UNITED STATES COURTS: 2 Bouv. Dic. See FEDERAL PROCEDURE; COURTS.

U. S. REPORTS: A. D. 1754-1908, 210 Vols. These are: Dallas, 1-4; Cranch (9), 5-13; Wheaton (12), 14-25; Peters (16), 26-41; Howard (24), 42-65; Black (2), 66-67; Wallace (23), 68-90; 91 U. S. (1 Otto).

The names of the reports are often omitted, i. e., instead of Dallas, Cranch, Wheaton, Peters, Howard, Black and Wallace, they are cited as "U. S." The student should have at hand a table showing which of the U. S. the various reports constitute. See MASSACHUSETTS.

U. S. v. AMISTAD, THE (Cinque's Case) (1841), 15 Pet. 518, 10 L. ed. 826; cited, 1 Bish. C. L. 564. S. P. in Oliver v. S. (1850), 17 Ala. 537, H. & T. S. D. (1 Crim. Def.) 725.

Self-defense. Any one may slay a malefactor to regain his lawful freedom or to prevent the commission of a violent felony. U. S. v. Amistad, The (Cinque's Case):

This was a notable case upon the subject of slavery, and ranks with *Dred Scott* and *Somerset Cases*. U. S. v. Holmes; P. v. Turner: 252.

One may resist unlawful arrest. A void warrant is no protection. C. v. Crotty (1865), 10 Allen, 403, 87 Am. Dec. 669. See ARREST; Allen: 167.

A warrant must set forth the name of the one to be arrested. Crotty. "John Doe or Richard Roe, whose other or true name is unknown," is insufficient. Crotty. Third persons may aid resistance to unlawful arrest, without committing riot. Crotty. A void warrant is no warrant. Crotty.

Right to resist unlawful arrest. Sub U. S. v. Holmes; Noles v. S.; Allen: 167; cases; *Necessitas inducit*, etc.

Resistance to commission of felonies. Oliver v. S.; 1 Crim. Def. 725-744 (Oliver and Dill cases).

U. S. v. ANTHONY (1873), 11 Blatch. (U. S.) 200, 2 Green, Crim. Rep. 208, 226, ext. n., Clark, Crim. Cas. 122, Fed. Cases, 14, 459; stated, 8 Rul. Cas. 47;

U. S. v. Anthony.—

cited, 1 Bish. C. L. 309, 336, 2 Wh. Ev. 1240, 3 Gr. Ev. 20. § 293, Gr. & Rud. Anthony stated: A., a female, voted for a congressman in a state where only males could vote. She was indicted under a federal statute, and her defense was her conviction that she had a right to vote, and that she voted in reliance on this belief. Her misconception of the law was unavailing, and she was convicted.

A judge may direct a conviction when facts are undisputed. Anthony. See Schick v. U. S.; cases; U. S. v. Taylor, 11 Fed. 470; S. v. Croteau: 271; *Ad quæstionem facti*, etc.

Mistake. Ignorantia facti excusat, ignorantia juris non excusat: Ignorance of the fact excuses, ignorance of the law does not excuse. Every one is presumed to know the law. Reynolds v. U. S.; Bostwick; Lansdowne; Hunt; P. v. Roby and R. v. Prince are interesting and striking illustrations of the doctrine of *Actus non facit reum*, etc.

U. S. v. CASSIDY (1895), 67 Fed. Rep. 698-783. Conspiracy as a crime. Spies v. P.; 3 Gr. Ev. 89, 99, 4 Encyc. Pl. & Pr. 706-736. The Spies and Cassidy cases present much that relates to conspiracy. See CONSPIRACY: cases.

Cited, §§ 294, 296, Gr. & Rud.

U. S. v. CRUIKSHANK: L. C. 232. Often cited herein as Cruikshank. Due process of law; indictments; certainty; presumption against pleader. R. v. Wheatley; Moore v. C.: 21; Huntman: 231; Dovaston: 217. Indictments under statute must be expanded. Cf. C. v. Bean: 226.

U. S. v. DREW (1828), 5 Mason (U. S.), 28, 1 L. C. Cas. (B. & H.) 131-145, ext. n., 2 Crim. Def. 54, Clark, Crim. Cas. 120 Fed. Cas. No. 14,993; stated, Laws. Insan. Cas. 601; cited, 1 Bish. C. L. 376, 384, 400, 2 id. 680, 3 Gr. Ev. 6, 2 Crim. Def., ext. n., 8 L. R. A. 33; French v. S. (1806), 93 Wis. 325, 10 Am. Cr. R. 606-625. § 348, Hughes' Proc.; § 294, Gr. & Rud.

Drew stated: D. was master of the ship John Jay. He was addicted to ardent drink and protracted sprees, which finally induced *delirium tremens*. In his ravings he had all intoxicants thrown overboard, and was restless day and night. He was wild and delirious, and while in this condition killed the mate. It was found that he was insane from abstinence from liquor, not directly intoxicated by its use. Held, he was not guilty of murder.

Harris v. U. S. (1896), 8 App. D. C. 20, 36 L. R. A. 465, 485, ext. n. (what intoxication will excuse crime). U. S. v. McGlue (1851), 1 Cur. C. C. 1, 2 Crim. Def. 54, Gt. Opin. Gt. Judges, 568, Clark, Crim. Cas. 121, Fed. Cas. No. 15,679; cited, 2 Bish. Cr. Proc. 672, 685; Aszman v. S. (1890), 123 Ind. 347, 8 L. R. A. 33, n.; S. v. Kraemer (1897), 49 La. Ann. 766, 62 Am. St. 664, n.; S. v. Mowry (1887), 37 Kan. 369, 15 Pac. 292, 10 Crim. Law Mag. 23-44, ext. n.; Evers v. S. (1892), 31 Tex. Crim. Rep. 318, 37 Am. St. 811, n.

Drunkenness; effect of; criminal intent. Insanity induced by drunkenness is a defense to indictment for murder, unless the insanity was directly caused by the immediate influence of such liquors. Beverley's Case; P. v. Rogers: 198; 36 L.

U. S. v. Drew.—

R. A. 465-485, ext. n.; Pirtle v. S.; C. v. Rogers: 199; R. v. Cruse; *In jure non remota causa sed proxima spectatur*; P. v. King (1865), 27 Cal. 507, 87 Am. Dec. 95-102, ext. n.; 10 Am. Cr. R. 606. *Effect of upon contracts.* Bagster; Molton: 413.

Insanity; when a defense to contracts. Lancaster County Bk. v. Moore (1875), 78 Pa. 407, 21 Am. Rep. 24-35, n. Drunkenness, how it affects contracts. *Note*, 21 Am. Rep. 29-35, 1 Add. Conts. 190; Mitchell: 415.

Drunkenness; intoxication a defense to a contract. To an action by an indorsee against an indorser of a bill of exchange, the defendant pleaded that when he indorsed the bill he was intoxicated, and thereby so entirely deprived of sense, understanding, and the use of his reason, as to be unable to comprehend the meaning, nature or the effect of the indorsement, or to contract thereby, of which the plaintiff, at the time of the indorsement, had notice. *Held*, to be a good answer to the action, and not to amount to an argumentative traverse of the indorsement (Gore v. Gibson). *See* L.C. 113-116.

A contract entered into when the obligor is in a state of intoxication, so as to deprive him of the exercise of his understanding, is voidable, and the party may, for that cause, avoid it, although the intoxication was voluntary and not procured through the circumvention of the other party. Barrett v. Buxton (1826), 2 Aiken (Vt.), 167, Ewell, Lead. Cas. Int., Id. & Cov. 223.

Intoxication; when a ground of relief in equity. General rule, that a court of equity will not assist a party who has obtained from a person intoxicated or one who wished to get rid of an agreement or deed, on the mere ground of intoxication.

Exceptions. Where any contrivance was used to draw him into drink, or any unfair advantage taken of his situation, or that extreme state of intoxication depriving a man of his reason, which, even at law, would invalidate a deed. Barrett v. Buxton; Gore v. Gibson, *supra*; Cook v. Clayworth (1811), 18 Ves. Jr. 12, 34 Eng. Reprint. 222; Ewell, Lead. Cas. Int., Id. & Cov. 740, n.

Evidence of intoxication of accused; for what purpose may be shown in defense. Hopt v. P. (1881), 104 U. S. 631, 26 L. ed. 873, n.; Warner v. S. (1894), 56 N. J. Law, 686, 44 Am. St. 415. It reduces degrees of crimes, when 2 Crim. Def. 432-768: cases.

Evidence; preponderance of; burden of proof. A single witness, not corroborated, is insufficient against a positive denial by the answer. Cook v. Clayworth, *supra*; Bonnell v. Wilder: 185.

Non-expert opinions. Ryder v. S. (1897), 100 Ga. 528, 38 L. R. A. 721-748, ext. n.

U. S. v. GOODING: L.C. 202.

U. S. v. HOLMES (1842), 1 Wall. Jr. 1, H. & T. S. D. 757 (1 Crim. Def.). Great Speeches by Eminent Lawyers, Chaplin, C. C. 195, Whart. Hom. 237, Clark, C. C. 137, Fed. Cas. No. 15,383; *stated*, Kerr, Hom. 17, 19 L. R. A. 358; *cited*, 1 Bish. C. L. 348, 848, 2 *id.* 260, 2 Crim. Def., Kerr, Hom., 1 Bish. Cr. Proc. 514, 672, 674.

U. S. v. Holmes.—

Cited, p. 39, Hughes' Proc.: §§ 46, 260, 293, 294, Gr. & Rud.

Holmes stated: Life-boats were filled with shipwrecked passengers. The sailors of the wreck clubbed these passengers with oars, and killed and drove them from the boats, to save their own lives. They were convicted of manslaughter, upon the ground that the ship (the common carrier) and its servants owed the passengers protection, and for this reason they were guilty. But for this element of duty they would not have been guilty.

R. v. Dudley. Common carriers owe passengers a duty. Kansas City M. & B. R. v. Riley. The carrier must protect the passengers from peril, not destroy them.

Self-defense; right to destroy innocent third person to protect one's own life. Bro. Max. 11; C. v. Selfridge; U. S. v. Schooner Amistad; Hooker v. Miller; Valden v. C.; *Necessitas inducit privilegium quoad jura privata; Ubi jus, ibi remedium. Necessity knows no law*; and upon this the law of self-defense is grounded. Nature is the foundation of law, and it cannot be superseded by the law of society. U. S. v. Outerbridge (1868), 5 Sawyer, 620; *cited*, 1 Bish. C. L. 200; 1 Bl. Com. 131, 3 *id.* 3; Bro. Max. 11.

It is not derived from society, but it is a right which every individual brings with him into society, except so far as the laws of society have curtailed it. Gray, 7 J. J. Marsh. 478, H. & T. S. D. 867 (1 Crim. Def.). High and paramount laws control lesser. P. v. Turner: 252; Oakley; *In praesentia majoris*, etc.

Every man is a guardian of the public peace, of the welfare of society. A private citizen may arrest a malefactor without a warrant for a felony actually committed. Allen: 167.

In this connection, elsewhere, is hinted at the rights and duties of the citizen. *Salus populi suprema lex.*

Brawls; disturbance of the public peace. Any one may interfere to stop a brawl or to preserve the public peace. *Salus populi*, etc. To prevent a violent felony; and may employ the force requisite to accomplish this end. Dill v. S., No. 75; 1 Bish. C. L. 343, 877, Cool. Torts, 167, Bl. Com. 2, n., 3 Br. & Had. Com. 2, n., 427, 4 *id.* 388, n., 730, Wells, Jur. 308, Bro. Max. 10, Whart. Hom. 480-559, 6 Watt, Ac. & Def. 695. It is here as elsewhere—every agency carries with it implied power to effectuate the principal purpose. *Expressio eorum*, etc.; McCulloch: 147; Logan v. U. S.: 249; *Cuiusque aliquis quid*, etc. Power to arrest will illustrate this view. Allen: 167; Bigl. Lead. Cas. Torts.

Private person may arrest for felony and take before a judicial officer. Burk v. Hawley (1897), 179 Pa. 539, 57 Am. St. 607.

Any one may destroy a malefactor to save the life of a good citizen, to prevent his inflicting upon society or any of its members a violent felony. Where one may defend himself, he may defend another. 1 Bish. C. L., §§ 843, 877; Squib Case. The general rule is, that what one may do for himself he may do for another. 1 Bish. C. L. 877, 3 Br. & Had. Com. 3, 2 Bl. Com. 3, n., 1 Kent, 48. It is an agency involved, and, too, a primal rule of agency.

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The law of self-defense is not larger in behalf of one's self or members of his family, or those under his protection, than it is in behalf of any good citizen. *Stanley v. C.* (1887), 86 Ky. 440, 9 Am. St. 305; *Beard v. U. S.* (1894), 158 U. S. 550, 39 L. ed. 1086. *Salus populi suprema lex.* However, it must be recognized that about this the written law and the jury law of the land are in discord, *e. g.*, defense of the wife's chastity presents one of these phases. *Biggs v. S.* (1860), 29 Ga. 723; *H. & T. S. D.* (1 Crim. Def.) 744-757; *Whart. Hom.* 407, 1 Bish. C. L. 866, 2 *id.* 408, *Cool. Torts*, 167; *S. v. John* (1848), *H. & T. S. D.* (1 Crim. Def.) 744-757, 8 *Iredell, Law* (N. C.) 330, 49 Am. Dec. 396, *n.*; *Price v. S.* (1885), 18 Tex. Ct. App. 74, *Kerr, Hom.* 145, 192-194.

This discord of the written and the jury law of the land may be traced to the denial of protection for women from mendacious defamation, as elsewhere noted. *Pollard.*

Defense of absolute rights may be to any necessary extent. Cinque, the African, was decoyed on board a vessel to reduce him to slavery. To regain his freedom he assaulted and slew his captors. *Held*, justifiable. *Amistad, The* (Cinque's case). Force to take life may be employed to resist commission of violent felonies, or surprising felonious attacks upon person or property or the habitation. *Crawford v. S.* (1893), 90 Ga. 701, 35 Am. St. 242, *n.*, 17 S. E. 628; *stated*, 37 Cent. L. J. 144.

The right of self-defense begins and ends with necessity; it cannot be carried to excess. Needless killing in self-defense is not permissible; taking of life must be avoided, if possible. One cannot kill to prevent a mere trespass. *C. v. Selfridge.* He cannot defend his property with spring-guns and dangerous instruments. *Hooker v. Miller*; *S. v. Moore*; 222a. Defense of castle gives large rights; these, however, have limitations. *Semayne's Case*; 1 Bish. C. L. 858. Sufficient force, even extreme measures, may be employed to eject an intruder, if necessary. *Estep v. C.* (1887), 86 Ky. 39, 9 Am. St. 260; *cases*; 1 Bish. C. L. 859; *C. v. Breyessee* (1894), 160 Pa. 451, 40 Am. St. 729, *n.* In the last analysis the foregoing rights are given by nature, and have been conceded to the citizen by guaranties in great charters. They are protected by the highest compacts. *P. v. Turner*: 252. Government is but an agency to protect, under great charters or compacts.

One cannot kill another who comes merely to beat him or commit a mere trespass. *Noles v. S.* But he may strike back in defense, and if in the progress of the conflict it appears necessary to kill, justification may arise from such appearances. 1 Bish. C. L. 857. Relative size and strength of the parties may be considered. *S. v. Benham* (1867), 23 Iowa, 154, *Hor. & Thomp. Cas. Self Def.* (1 Crim. Def.) 126, 92 Am. Dec. 417-422; *cited*, 1 Bish. C. L., *q. v.*; *S. v. Burke* (1870), 30 Iowa, 331, *Hor. & Thomp. Cas. Self Def.* (1 Crim. Def.) 126, 1 Bish. C. L. 873; *Rowe v. U. S.* (1896), 164 U. S. 546, 41 L. ed. 547.

In defense of absolute rights, one may resist. Cinque's Case; *Allen*: 167. But not to prevent mere unlawful arrest—a mere trespass. 1 Bish. C. L. 868; *Noles v. S.*;

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Kerr, Hom. 13, *et seq.*; *Necessitas inducit.*

One must not seek or provoke a conflict. *Volenti, etc.*; *Nullus commodum, etc.*; *Qui primum peccat ille facit rixam.* From one's own fault a perfect defense cannot arise. 1 Bish. C. L. 869, 2 *id.* 702. The necessity must be avoided; retreating to the wall is demanded; trespasses, beatings amounting to chastisement, must be borne before life is taken. *C. v. Selfridge.* In short, one must only kill in defense of life and of absolute rights, and only when the permanent destruction of these are threatened—imminent. 1 Bish. C. L. 836-877; *Rowe v. U. S.*

Resistance to simple assaults and batteries must not be excessive. *Gallagher v. P.*; *Grainger v. S.* One has no right to kill to prevent a mere trespass. *Noles v. S.*; *S. v. Moore.* One committing petty depredations, simply mere trespasses, is not without the protection of the law. *Hooker v. Miller*; *Bish. Torts*, 942-946. The owner of premises has no right to resist simple trespasses, mere entries thereon, with instruments dangerous to life or limb. The owner of a vineyard has no right to set a spring-gun on his premises to shoot persons entering thereon to steal fruit. *Hooker v. Miller*; *Bird v. Holbrook*; *S. v. Barr* (1895), 11 Wash. 48, 48 Am. St. 890-898.

Every man is presumed to know the law. Full defense requires that the actor know the facts and rightly judge them. *Hickory*: 194.

Retreating to the wall. One must, if possible, avoid the imminence which alone will justify excessive or destructive resistance. *Pond v. P.*; 1 Bish. C. L. 869.

Words are no provocation for a blow. 2 Bish. C. L. 702; *Stephens v. Myers*; *S. v. Hatch* (1896), 57 Kan. 420, 57 Am. St. 337, *n.* (one need not apply for process of law, to bind over, before slaying); *S. v. Gordon*, 109 Am. St. 790.

One in his dwelling need not retreat. Every man's house is his castle. *Semayne's Case*; *Brinkley v. S.* (1889), 89 Ala. 34, 18 Am. St. 87, *n.*; *Estep v. C.* (1887), 86 Ky. 39, 9 Am. St. 260; *Allen v. U. S.* (1896), 164 U. S. 492; *S. v. Robertson* (1898), 50 La. Ann. 92, 69 Am. St. 393, *n.*

Adulterer of wife can make no full defense if caught in the act by her husband. *Drysdale v. S.* (1879), 83 Ga. 744, 20 Am. St. 340, 6 L. R. A. 424. *Contra*: *Wilkerson v. S.* (1893), 91 Ga. 729, 44 Am. St. 63 *n.*; *S. v. Grugin* (1898), 147 Mo. 39, 42 L. R. A. 774 (the jury view of the written law).

Volenti non fit injuria: That to which a person assents or which he invites is not in law esteemed an injury. *S. v. Beck.* One cannot provoke an assault upon himself and afterwards make full defense. 2 Bish. C. L. 702; *C. v. Selfridge* (*Selfridge's Case*). *Nullus commodum, etc.*; No man should take advantage of his own wrong. *Valden v. C.*: 155.

Provocation. 3 Gr. Ev. 122-127; *R. v. Dudley*; *R. v. Stedman*; 5 Crim. Def. 1085-1117; *Rowe v. U. S.* (1896), 164 U. S. 546. Words are no provocation for an assault. *Stephens v. Myers*; 3 Gr. Ev. 122-127; *Allen v. U. S.* (1896), 164 U. S. 492.

Necessity. Starving sailors, shipwrecked, can not kill each other to save life, as a matter of law. *R. v. Dudley.* See *U. S. v. Holmes.*

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Arrest, illegal. Right to make defense against. Allen: 167; Bigl. Lead. Cas. Torts; 1 Bish. C. L. 868; Miers v. S. (1895), 34 Tex. Cr. Rep. 161, 53 Am. St. 705, n.; John Bad Elk v. U. S. (1899), 177 U. S. 529 (a warrant is essential, and one may resist an arrest without it); Howard v. S. *Arrest, law of.* 1 Bish. Crim. Proc. 155-218, Clark, Cr. Proc., Whart. Cr. Pl. & Pr.; Allen: 167.

Compulsion as a defense. R. v. Tyler. Private defense of self and property. Bish. Torts. 942-946; 1 Whart. Tres. 158-170; Aldrich v. Wright (right to kill animals). Four minks entered Wright's premises and assailed his geese in a pond. He shot the minks in defense of his geese, and Aldrich, the owner of the minks, sued W. for their value. *Held.* W. was justified. 2 Wat. Tres. 899, 900, Moak, Torts, 507; Williams, 65 N. C. 416; *stated*, Wood, Nuis. 837.

Defense of person and property. Aldrich, *supra*; 1 Bish. C. L. 836-877. Owner of property may defend its possession and make full resistance to any attacks upon that possession. P. v. Kane (1892), 131 N. Y. 111, 27 Am. St. 574, n.; Alberty v. U. S. (1895), 162 U. S. 499, 40 L. ed. 1051, n.; *Salus populi*, etc.

Threats as an element in homicide cases. Thompson v. U. S. (1894), 155 U. S. 271, 39 L. ed. 146, n.

Compulsion, acting under, no defense for crime. R. v. Tyler. *Killing to prevent a robbery; how far justifiable.* Crawford v. S. *supra*.

Trespass; no right to kill for. Crawford; Hooker; Noles.

Bad character of deceased may be shown. Gardner v. S. (1892), 90 Ga. 310, 35 Am. St. 202, n.; Smith v. U. S. (1895), 161 U. S. 85; 2 Bish. Cr. Proc. 609-636.

See CHARACTER.
Capital punishment the result of perjury is murder. 1 Bish. C. L. 564.

Homicide. Wharton, Kerr, Hor. & Thomp. Cas. Self-defense (1 Crim. Def.) (insanity a defense); 5 *id.*, HOMICIDE; SELF-DEFENSE.

Violent felonies, right to resist. 2 Bish. C. L. 613-745, 2 Bish. Cr. Proc. 495-633, Bish. Stat. Crimes, 465-477; Gourko v. U. S. (1893), 153 U. S. 183, 38 L. ed. 699 (notes, self-defense); 5 Crim. Def. 911-1199, Clark, Crim. Cas. 207-272, 3 Gr. Ev. 114-149.

Infanticide. R. v. Waters: 71.

U. S. v. HOKIE (1808), 1 Paine (U. S.), 265, 4 Crim. Def. 243, ext. n., 1 Bish. C. L. q. v., 2 Best, Ev. 620, 3 Gr. Ev. 237-248 (elements of treason). *Ex parte* Lange (1874), 18 Wall. (U. S.) 163-205 (former jeopardy; when it attaches. *See* Kinloch's Case); Roberts v. S. (1853), 14 Ga. 8, 58 Am. Dec. 528-549, ext. n.

U. S. v. KING: L.C. 192.

U. S. v. KIRBY (1868), 7 Wall. 482; *stated*, 143 U. S. 460.

Actus non facit reum nisi mens sit rea. Farris, a fugitive from justice, was charged with murder in Kentucky. K. had a warrant and summoned a *posse* to arrest F., who was on a steamboat, the Gen. Buell, which was then carrying the mail; this was obstructed by the operations of K. and his *posse*, for which he was indicted. He specially pleaded a justification and this was certified, asking if under the facts stated K. was guilty.

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Held, he was not, because he did not intend to violate the federal law. The trial judges were divided in opinion as to K.'s guilt, so the case was certified to the federal supreme court.

K. did not knowingly and wilfully obstruct the mail. A carrier of it may be arrested for fast driving. *Contra* cases. A train may be stopped to make an arrest.

Construction of statutes. Burks v. Bosso: 217a; Church v. U. S.; C. v. Hess: 215. *Statutes yield to fundamental law.* 143 U. S. 460, 461; C. v. Hess. *See* CONSTRUCTION; *Lex non exacte.*

Statutes must be sensibly construed. Union Trust Co.; *Verba intentione; Glossa verperina.*

U. S. v. MILLS: L.C. 235.

U. S. v. PARROTT (1858), M'Allister: 271, 7 Mor. Min. Rep. 346-348. Denials in answer in equity—to dissolve injunction. Poor: 37; Dickson: 34.

U. S. v. PECK: *Lex non cogit ad impossibilia.*

U. S. v. PERRE: L.C. 69.

U. S. v. STANDARD OIL CO. OF INDIANA (1908), — Fed. Rep. —. *Cited*, *Lex non exacte.*

Maledicta expositio corrodit viscera.

This case illustrates the diversity of juridical intellects construing statutes. The trial judge sought to construe to effectuate the purpose of the statute as he interpreted it. The court of errors was manifestly immoderate and quite intemperate in its expressions of disapprobation of the attempts to carry out any such purpose of the act. The latter plainly favored a nullification of the statute. Any statute can be defeated by hostile construction. *Cujus est instituere ejus est abrogare.* A court of errors from which there is no appeal is above parliaments and executives. *In præsentia majoris.*

Laws for the public welfare should not be left for final exposition by intermediate courts. *See* Observations: THEORY OF THE CASE; 67 Cent. L. J. 101, 102.

Warring and incomprehensible courts are greatly obstructing and impairing the due administration of the laws. Lange: 159; Dovaston: 217. *See* ILLINOIS; MISSOURI; THEORY OF THE CASE.

Codes, practice acts and congressional legislation alike suffer from evil construction. Acts for the public welfare are constantly made inoperative by viperous interpretation. The stupendous fine of \$29,240,000 against a gigantic combination of malefactors was set aside for reason not greater than this: that the trial judge had convicted parties not before the court. And this is the way the court of errors said it was done: by inquiring after the all-powerful accessories and instigators of the crimes charged against a creature of

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an all-swaying conspiracy, of vast and governmental proportions. To illustrate it is observed that if a ruler of France, a hostile government, were to instigate a long series of criminal acts against America, for which a minimum and a maximum fine were provided, and to determine which should be assessed the court, to inform itself, inquired beyond a record presenting the indicted individuals, this would not be convicting France without a hearing; that this would not violate the principle, *Audi alteram partem*. Bear in mind France could not be indicted nor convicted by American courts. Incidentally fixing the relations of France to the supposed crimes for the purpose of assessing repressive fines would not be convicting France unheard.

One who directs, controls and manages litigation is concluded thereby. *Bauerman*: 48. And this may be shown by oral evidence. *Qui sentit commodum sentire debet et onus*. It may also be shown who are the accessories to crime either directly or incidentally.

Claimants meet many astonishing disappointments from construction in pursuing claims. Colorado could not recover interest from a treasurer loaning state funds. *Sub Keech v. Sandford*. Indiana likewise lost \$1,000,000 of school funds. *Terre Haute (Pennsylvania) R. R. v. Indiana*. See § 151, Gr. & Rud. The federal government was tied up and finally lost in a five months' trial, of the admissibility of evidence, relating to the competency of the books of packing companies to be used against the accused. *Nemo tenetur seipsum accusare*. Here and there, fundamentals are more than stretched out—they are torn. From results, it is perfectly clear that the power to construe is the power to destroy.

In *M'Culloch*: 147, *Cohens*: 244, *Martin*: 247, *South Carolina v. S.*, the court was asked so to construe as to defeat the development of the federal government. But instead the court chose a higher and a clearer way. It refused to set aside and emasculate the imperial mandates of a government of the people, by the people and for the people.

U. S. v. WILTBERGER (1820), 5 Wheat. (U. S.) 76; stated, 177 U. S. 310 (penal statutes are strictly construed); *Ellis v.*

U. S. v. Wiltberger.—

U. S.; *Perrault v. R. R.* (1903), 117 Wis. 520; *Burks v. Bosso*: 217a; cited § 294, Gr. & Rud.

UNIUS CUIUSQUE CONTRACTUS INI-
tium spectandum est, et causa: The beginning and cause of every contract must be considered. Dig. 17, 1, 8; *Story*, Bailm., § 56. *Hughes*, Conts. *Contemporanea*, etc.

UNIUS OMNINO TESTIS RESPONSIO
non audiatur: Let not the evidence of one witness be heard at all. Code, 43, 20, 9; *Bonnell*: 186.

UNLAWFUL DETAINER: *Washington*, 84 Ark. 220, 120 Am. St. 29-67, ext. n.

UNO ABSURDO DATO, INFINITA
sequuntur: One absurdity being allowed, an infinity follow. 1 Co. 102. One absurdity will breed many. An illustration of this is found in those jurisdictions that abolish the mandatory record, or attempt to change the definition of jurisdiction or its landmarks—due process of law. THEORY OF THE CASE; WAIVER; PLEADINGS; PROCEDURE; SUPREME LAWS OF THE LAND, etc.

Cited, p. 33; §§ 5a, 6, 7, 19, 28, 36, 107, *Hughes' Proc.*; §§ 54, 147, 150, 156, Gr. & Rud.

UNUS TESTIS AFFIRMANUS PLUS
valet mille negantis: The testimony of one who affirms is worth more than that of ten who deny. *Green v. Hotel*, 26 Quebec, 9, 7 Am. & Eng. Cas. 12.

UPTON v. TRIBILCOCK (1875), 91 U. S. 45-46, 25 L. ed. 203, *Cumming*, Cas. Corp. 824. See *Cook*, Corp.; *Greenh. Pub. Pol.*, Bigl. Fraud, 2 Pom. Eq.

Corporations; implied promise; liability of stockholder upon stock; "non-assessable" stock; liability on. Misrepresentation of agent; liability of a party injured thereby. One must inform himself of a contract before he signs it. Williams v. Stoll: Volenti non fit injuria.

Capital stock of a corporation as a trust fund for the payment of debts. Upton; 48 Minn. 174, 31 Am. St. 637, 15 L. R. A. 470, n., 78 Iowa, 460, 5 L. R. A. 469. Stockholders' liability. Thompson v. Reno Savings Bank (1885), 19 Nev. 103, 3 Am. St. 797-873, ext. n.; Fowler, 146 Ill. 472, 37 Am. St. 163-175, ext. n.; Parker, 19 Ind. 213, 81 Am. Dec. 385-402, ext. n.; U. S. v. Stanford (1896), 161 U. S. 412; 40 L. ed. 751, n.; Van Cleve, 143 Mo. 109, 42 L. R. A. 593-606, ext. n.; Cook, Stockh.

A corporation cannot contract to sell its own capital stock for less than its face value. *Oregon Gold Min. Co. of India v. Roper* (1892), A. C. 125, 61 L. J. Ch. 337, 66 L. T. 427, 41 W. R. 90, 7 Rul. Cas. 644, n.; notes, *Thompson*.

USAGE: See *CUSTOM*. 2 Bouv. 1182, And. Dic., Ans. Conts. 248, 249.

Cannot change or oppose a statute. *Optimus interpres*, etc.; *Wigglesworth*: 399; *Noble*: 251. See *DAYS OF GRACE*. Agency; usage to control. *Goodenow*; 196 U. S. 157. Presumptions as to customs and usages. *Great Western Co. v. White* (1902), 56 C. C. A. 358-368, ext. n.

Custom and usage are no excuse for crimes. Crookford v. S., 73 Neb. 1, 119 Am. St. 876, n.; *R. v. Esop*; *Ignorantia legis*.

Evidence to prove; admissibility. Laws. Conts. 383-385. To explain technical terms in written contracts. Id. 383. To aid unexplained terms. Id. 384. Requisites to the validity of a custom. Id. 385.

USE AND OCCUPATION: *Fitzgerald v. Beebe* (1847), 7 Ark. 305, 46 Am.

Use and Occupation.

Dec. 285, n.; Lazarus, 152 U. S. 81; Monroe, 24 Mont. 316, 81 Am. St. 439, 2 Warr. Vend. 873-884, 2 Bouv. Dic.; 2 Page, Conts. 846.

USURPATION: Pleadings are to prevent. See JURISDICTION; PLEADINGS; RECORD; STORY; Windsor: 1; Harrigan, sub MAGNA. §§ 26, 30, 52, 61, 177, Hughes' Proc.

Nihil habet forum ex scena. A power that can be abused is certain to be abused. See JURISDICTION. Arbitrary power is excluded from every department. Noel v. P. (1900), 187 Ill. 587, 79 Am. St. 238. Unconstitutional acts are void. Kelly; Royall: 284. See THEORY OF THE CASE.

Jurisdiction should neither be usurped nor declined. See JURISDICTION. Division of state power to prevent. S. v. Baughman: 268. Is objected to by implication. Campbell: 2. §§ 87, 88, Hughes' Proc.

Legislatures guilty of usurpation. Condon, 89 Md. 99, 73 Am. St. 169 (cannot validly legislate beyond state lines). *Courts guilty of, when.* Windsor: 1. *Federal courts guilty of; aggression of.* 40 Wis. 202.

When trial court did not make a finding on evidence the supreme court cannot. Di Nola, 143 Cal. 106, 65 L. R. A. 419. *May be resisted.* Pennoyer: 58; Martin: 246. See *Coram judice*; RESISTING AN OFFICER; *In re Christensen* (1898), 17 Utah, 412, 70 Am. St. 794; R. v. Cumpston; Bryant v. S. (1884), 16 Neb. 651, 6 Crim. Law Mag. 342-348 (illegal service of process can be resisted); U. S. v. Fears (1878), 3 Wood (U. S.), 510, 4 Crim. Def. 454, n.

Examples of. See *Coram judice*; COLLATERAL ATTACK. Insidious effects upon procedure. See DIVISION OF STATE POWER; JURISDICTION; THEORY.

Collateral attack; proceedings founded on usurpation, subject to. See *Id.* Proving a fact admitted upon the record is surplusage. *Nihil habet, etc.* See Dickson: 34.

Municipal bond; recital of the law it is founded on, and if a wrong law, still power to issue may be shown. Wilkes County v. Coler (1901), 180 U. S. 506, 525: cases.

Distinction between usurpation and abuse of power. Whart. Conts. 137 (corporations).

USURY: Bank of Newport, 60 Ark. 288, 46 Am. St. 171-202, ext. n., 29 L. R. A. 760; 2 Bouv. 1184-1186; And. Dic.; 1 Page, Conts.

Effect of taking or reserving illegal interest by a national bank. Citizens' National Bk. v. Gentry (1901), 111 Ky. 206, 56 L. R. A. 673-709.

UTERNEHLE V. NORMENT (1905), 197 U. S. 40. § 308, Gr. & Rud. Ignorantia.

UTILE PER INUTILE NON VITIATUR: Surplusage does not vitiate that which in other respects is good and valid. Bro. Max. 626-629; Bristow: 135; Dickson: 34; Garland: 60; P. v. McCumber: 110; Sturges: 111; Kraner: 299; Gay: 138; Cohens: 244; Cooch; ABATEMENT. Cited, Hughes, Conts.

Max. No. 25, §§ 251-260; cited, §§ 7, 23, 121, 251, 258, 267, 262, 321, 324, Hughes' Proc.; §§ 164, 272, 278, 311, Gr. & Rud. Surplusage has no effect. *Surplusagium non nocet*; Russell v. Shurtleff; 1 Gr. Ev. 63.

Descriptio personæ words, q. v. Sturdivant: 410; 105 Mo. Ap. 1, 137.

Utile per Inutile.

Conclusions of law are surplusage, and should be stricken as such. Waiver cannot cure them. 105 Mo. Ap. 567; cases; Dobson; 232a; Mallinckrodt: 12a.

A purchaser of land under an execution sale must look to the judgment and its foundations, the execution, levy, sale and sheriff's deed. Notes, Lampleigh: 301. All else is surplusage.

In courts where collateral attack does not reach the whole record and attach to the first substantial fault (see DEMURRER), nothing but the judgment entry in sufficient form need be introduced to sustain a claim, right, title or authority. More than that is surplusage—the mandatory record and all it includes—pleadings and all other parts—are surplusage. Consequently, in ejectment suits, the judgment entry only is sufficient; and more than that the latter record, which includes the pleading—the judgment roll—is surplusage. *Uno absurdo dato, infinita sequuntur.* See *Debile fundamentum fallit opus*; Pennoyer: 58; Ricketson: 57; Galpin: 63; Windsor: 1; Munday: 79; Lampleigh: 301; *Res adjudicata*; STORY.

Provisions inserted in contracts in obedience to an unconstitutional statute may be disregarded. Cleveland, 67 Ohio, 197, 93 Am. St. 670; Mallan: 373.

It is held that a chattel mortgage if void in part is void in toto. Russell v. Winne (N. Y.).

All of the statutory record upon which no error is assigned is surplusage; that record depends upon error duly assigned. See ASSIGNMENT; APPELLATE PROCEDURE.

UT RES MAGIS VALEAT QUAM PEREAT: The law seeks to conserve rather than destroy; or, in other words, the thing may have validity rather than be lost. Bro. Max. 540-576.

Cited, §§ 29, 30, 73, 84, 108, 135, 145, 179, 205, 219, 228, 234, 237, 250, 256, 261, 262, 267, 273, 277, 322, Hughes' Proc.; §§ 151, 164, 175, 206, 237, Gr. & Rud.

COGNATE MAXIMS AND CASES: *Benigne faciendæ sunt interpretationes, etc.*: A liberal construction should be put upon written instruments so as to uphold them, if possible, and carry into effect the intention of the parties. Bro. Max. 540-576; 1 Chit. Conts. 111-113; Whart. Ag. 224, 523; Mech. 304; Sto. 150-152; 2 Bl. Com. 380; Suth. Stat. 331, 332; Sedg. Stat. 226: cases; Jones, Construct. 222-232; 2 Best, Ev. 347, 544, n.; Thomas v. Citizens' R. R.

Expressio eorum quæ tacite insunt nihil operatur; Omnia præsumuntur rite et solemniter esse acta; Falsa demonstratio non nocet; Surplusagium non nocet; Utile per inutile non vitiatur; Verba intentione debent inservire; Certum est quod certum reddi potest; Benedicta est expositio quando res redimuntur a destructione; Noscitur a sociis; Lex non exacte definit, sed arbitrio boni viri permittit; Concordare leges legibus est optimus interpretandi modus; Nimia subtilitas, etc.; In pari materia; Ex antecedentibus, etc.

McCullough: 147 (*Expressio eorum, etc.*); Trist: 214; Oakley (Government and its scheme of protection, education and moral elevation, is a dominating idea in construction).

Cooper v. Reynolds; Harvey: 123; Hume: cases; Rensberger; Breeze (extreme applications of theory of the case to sustain judgments). See THEORY.

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Moynahan v. P.; *Supply Ditch Co. v. Elliott*; *Russell v. Shurtleff* (destructive strict construction).

Fayerweather, sub *Res adjudicata* (intelligent and fair construction); *Outram*: 25; *Cromwell*: 26 (Conservatively strict construction); *U. S. v. Cruikshank*: 232 (*De non apparentibus*, etc.; *Verba fortius*, etc.); *Huntsman*: 231 (statute cannot prescribe rules of construction—limits of legislative power); *Munday*: 79 (no issue, no trial); *Crain v. U. S.* (plea must be shown from the mandatory record). See *Leading Cases* 1-28; 46-84; 214-232; *THEORY*.

Fayerweather; *Windsor*: 1; *Bates*: 225 (cases respectful of the conserving principles). *R. v. Waverton*: 70. See cases, sub *Verba fortius*, etc.; *P. v. Mosher*, 163 N. Y. 32, 79 Am. St. 563 (Constitution). *U. S. v. Cramps* (1907), 206 U. S. 118 (a release upheld).

Roe v. Tramarr (deeds are upheld, if possible); *Sturdivant*: 410; *Crooker* (commercial paper upheld, if possible). *Harper*: 218 (intention, when manifest, controls express words—*Verba intentione*, etc. *Fay's Estate* (*Noscitur a sociis*)).

Dobson (*Omne majus continet in se minus*; limitations of alder by verdict, of *Omnia presumuntur rite*).

Limitations of *Ut res magis valeat quam pereat* are constituted of the conserving principles of procedure. There is no liberal construction at the expense of that certainty essential for administrative functions and means of a constitutionalism. Here, repeating, material allegations can not be drawn from argument and inference; they must affirmatively appear. *Verba fortius*, etc.

Dobson: 232a; *Cruikshank*: 232; *Thomas v. Board*; *Verba fortius*, etc.; *ALLEGATIONS*; *PLEADINGS*; *MAXIMS*; *RULES OF COURT*; *Leading Cases* 1-28; 69-84; 90, 91; 196 U. S. 395.

Judgments are sustained, if fairly and reasonably founded by the mandatory record. They depend upon compatibility with the mandatory record. A late case well illustrating this view is *Fayerweather*, cited under *Res adjudicata*.

See also *Windsor*: 1; *Dobson*: 232a; *Clem*: 2c; 1 Chit. Pl. 703-716 (statute of jeofails); *Rushton*: 5.

To illustrate, it may be observed that if the location of a parcel of land is in question, and one corner or line can be established, the remaining corners will be sought, and, if possible, will be traced and established. *Ut res magis valeat*, etc., is applied in such cases. *Bloom*: 266.

If a contract is in question, and it can be picked out and established from many documents, writings or letters, it will be done. *Boydell*.

If one sells a parcel of land entirely surrounded by more that he owns, he will be compelled to give a right

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of way, of necessity, to that parcel. *Pinnington*; *Roe*. But if the survey of the parcel of land cannot be made, then the grant fails; and so it is with the contract. *Goss*: 55; *Pym*: 52. And so it is with judgments, except in some states where the requirements of the mandatory record are disregarded and for it the statutory record is substituted, or if this fails, then evidence *aliunde* is sought.

See pp. 8-42, §§ 1-13, *Hughes' Proc.*; *PLEADING*; *RECORDS*; *WAIVER*; *Verba fortius*, etc.; *THEORY*.

Upon the doctrines of the theory of the case some courts carve out and set up causes of action or defenses from several different kinds of matter.

But for the deed or contract they will be far more consistent. Where these must appear from a writing, then it is strictly required. For the judgment they apply far more liberal rules.

"What ought to be of record must be proved by record and by the right record" (§ 104, Gr. & Rud.) is one of the conserving principles of procedure. *Iverslie*: 46; cases. This basic rule should be considered in fixing the limitations of *Ut res magis valeat*, etc.

Judicial records are strictly construed where the conserving principles of procedure are involved. This is well indicated by the rules of *res adjudicata* and also from the maxim, that every presumption is against a pleader.

Dovaston: 217; *Cruikshank*: 232; *In presentia majoris cessat potentia minoris*.

Abatement and dilatory pleadings are strictly construed, with a view to defeating them, so that the case may proceed to a final hearing upon the merits, which is in obedience to one of the conserving principles of procedure.

Roberts v. Moon; *Kraner*: 299. See *ABATEMENT*; *Verba fortius*, etc.; *Interest reipublicæ*.

In questions relating to appellate procedure, collateral attack, *res adjudicata*, due process of law, division of state power, constructive notice, removal of causes, election of remedies, justification of officers, and other conserving principles on the one hand the principal maxim arises, and on the other *Verba fortius*, etc. The range of the discussions often involves other maxims, for sometimes *Expressio eorum*, etc., arises

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for consideration, while at other times *Expressio unius*, etc., is weighed. It is *Lex non exacte* on one hand and *Ita lex scripta est* on the other.

The importance of *Allegans contraria non est audiendus* has already been introduced. It is extendedly referred to under *Res adjudicata*, and there are pointed out hopelessly conflicting cases, also what they have led to and are still influencing. These dreadful exhibitions arise from wild and exaggerated notions of *Allegans contraria*, etc., waiver, consent and acquiescence. (See *WAIVER*.) In some of the cases, with the record—the pleadings, the chart, the power of attorney—before the court, it declares the conduct of an appellant reprehensible and a fraud on the court, and that such conduct operates as an estoppel against the errors assigned. See *COLORADO*; *MISSOURI*; *ILLINOIS*; *THEORY OF THE CASE*. To defeat this fraud, the court disregards the maxims *Quod ab initio non valet intractu temporis non convalescit*, *Frustra probatur quod probatum non relevat*, and *Expressio unius*, etc., also a dominating principle or high policy in a constitutionalism, viz.: "What ought to be of record must be proved by record and by the right record." (P. 14, Hughes' Proc.; § 104, Gr. & Rud.) Such decisions show that the mandatory record is not understood, also ignorance of the origin, history and functions of the statutory record. §§ 7, 9, 17, Hughes' Proc. Where these records are not understood, only a Babel, or wreck-heap of distorted, twisted and perverted principles appears.

See *Cujus est instituere*, etc.; *In præsentia majoris*, etc.; *LITERATURE*; *MAXIMS*; *WAIVER*; notes to *Dovaston*: 217.

Cases cited under *Res adjudicata*, *Verba fortius*, etc., and *De non apparentibus*, etc., illustrate applications of the principal maxim, which greatly encroach upon requirements of the conserving principles of procedure under the name of the "Theory of the Case," also the code rules of construction which are quoted and discussed under *Maxims*. See *Verba fortius*, etc. Under new names, with legislative countenance, the enlarged rule in the principal maxim is one of the most aggressively innovating. To illustrate, it may be observed that the substitution of the statutory

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record for the mandatory is by means of the "theory of the case." Consequently its progressive and widening scope has changed the foundation of judgments. This change tremendously affects procedure, its cognate subjects, and especially contracts.

See *CONSTRUCTIVE NOTICE*; *REMOVAL OF CAUSES*.

The code was enacted in 1848, and, as with all statutes, a contrariety of views attended its application. One of these was that technicalities were abolished, and naturally this view was pressed with such plausibility and force as to find expression in and conception of the theory of the case. This rule led to variances and departures from this condition, and the gathering of unreflecting decisions and glosses of like commentaries, the waiving of the pleadings and of the record necessarily followed. To round out this astounding innovation it became necessary to substitute the statutory for the mandatory record. By this the foundation of the judgment was changed. New jurisprudences were introduced and a demand for new dictionaries was created. By this time the law of waiver was greatly broadened and deepened, and the notion of upholding a judgment at the expense of old rules became so enlarged that this was done as caprice or whim dictated. With the development of the rule called the "theory of the case," came disregard and even contempt for the mandatory record, and the maxims that called for and required it.

See *MAXIMS*; *LITERATURE*; *Dovaston*: 217; *Green*: 90; *Verba fortius*, etc.; *THEORY*.

The prescriptive constitution had to be ignored, as well as a true view of a few maxims, the lawyer's ten commandments. *Regula pro lege, si deficit lex*, "The Roman still holds dominion over this world by the silent empire of his law," had to be battered down and lost in the marshes and swamps of unmoored decisions, as is illustrated under the title "EQUITY." And willing hands, seeing golden rewards, were abundant, with endless grists of sophistry and profuse jargon.

General expectation of something fundamentally new made a demand for the exploitation of the code upon new lines. Naturally this demand came to be supplied, and accordingly

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the maxim and the old case illustrating the application of it were disparaged and denied. The denunciations of these, both expressly and impliedly, are attested by thousands of pages. No maxims were more in the way of the glosses of the new dispensation than *Verba fortius*, etc. (*Dovaston*: 217), *Frustra probatur quod probatum non relevat* (*Adams v. Gill*) and *De non apparentibus*, etc. (*Rushton*: 5). See INDICTMENTS. These maxims are basic and upon their right application depend the operations of a constitutionalism. They require the mandatory record, and that a court be bound thereby. However, these maxims and cases came to be viewed as adjective law, and their application or rejection a local or tribal question and nothing more.

From observations elsewhere made the fundamental character of these maxims appears, also that they are the first of an unwritten constitution. *Verba intentione*, etc. See INTRODUCTION; §§ 1-12, Hughes' Proc.

Misconceptions of basic and fundamental requirements of a constitutionalism, and of procedure as well, are responsible for these attempts to alienate code procedure from that of other systems and their maxims. No real, congruous and distinctly separating chasm between the code and other systems is yet discoverable. All attempts to define and to establish a well-marked line of separation have resulted in nothing more than making of the code a mystery to those not familiar with the fundamental maxims of procedure, of logic, and the cases that illustrate the application of these maxims. The proposition that the study of procedure is a study of government should be considered in this connection. The unity and philosophy of all systems should be comprehended, and further, that all systems recognize, possess and maintain the conserving principles of procedure as essential matters in the scheme of protection from government, and that for these all lesser laws must yield. *In presentia majoris cessat potentia minoris*.

See pp. 8-17; §§ 1-13, Hughes' Proc.; §§ 83-123, also 171-261, Gr. & Rud. *De non apparentibus*, etc.; *Cujus est institueret*, etc.; *Verba fortius*, etc.; GOVERNMENT; DUE PROCESS OF LAW RECORD; CONSTITUTIONALISM; PLEADING; PROCEDURE; *Quod ab initio non valet, in tractu*

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temporis non convalescit; RECORD; LITERATURE; MAXIMS; WAIVER.

In judicial proceedings a judgment will be upheld, if possible. But for its foundation the right record matter must exist and be sufficient, else it is subject to collateral attack. But, if that foundation and that judgment are not sufficient, then it is called *coram non iudice*, which means that it is null and void.

Windsor: 1; *Campbell*: 2; *Moore*: 21; *Munday*: 79; *Cruikshank*: 232. See MANDATORY RECORD; *Debite fundamentum fallit opus*; *Sententia non fertur*, etc.; *Res adjudicata*; *Dovaston*: 217; *J'Anson*: 91; LITERATURE; PROCEDURE; THEORY.

From the above rule appears the importance of construction, and of the maxim, *Cujus est institueret, ejus est abrogare*.

Title to land arising on judicial proceedings will be upheld if possible. *Benedicta est expositio redimitur a destructione*. The presumption of regularity will be liberally applied to uphold the title to land which must be supported by a judgment and probate proceedings; for that *Omnia presumuntur rite et solemniter esse acta* will be liberally indulged in. *Nunc pro tunc* entries and amendments will be favorably viewed. *Actus curiae neminem gravabit*. Amendments made while the proceedings are *pendente lite* will not be technically viewed; if made from files and record memoranda, notice of such amendments need not be given. *Actus curiae neminem gravabit*; *Lex neminem cogit ad vana seu inutilia peragenda* (vain and fruitless things will not be required). Material error must be shown upon collateral attack; mere irregularities will not be noticed. *De minimis non curat lex*. *Collier v. Catherine Lead Co.* (1907), 208 Mo. 246, 106 S. W. 971-974.

A complaint must be construed upon the theory most clearly outlined by the facts stated therein. *Pittsburgh R. R.*, 141 Ind. 843, 50 Am. St. 313; *Denver Co.*, 21 Colo. 371, 37 L. R. A. 567. See THEORY. *Conviction for crime. All parts of the record will be looked to, and construed together to sustain.* *St. Clair*, 154 U. S. 134; *Pointer v. U. S.* (1894), 151 U. S. 396. *Verba relata*, etc.

Judgments and verdicts have applied to them this maxim. *Consensus*, etc.; *Rushton*: 5; *Verba relata hoc maxime*, etc.

Returns upon execution. "Executed by leaving copy with" (stating names of three persons, O. J. C.), "this 14th day of Sept. 1853," will be aided by the court's findings in the judgment that process was duly served, and also by the fact that the officer charged fees for three copies. *Whitman*, 74 Ill. 147; *Van Fleet*, Col. Att. 436.

Aider by verdict is allied to this maxim. *Hitchcock*: 12; *R. v. Waters*: 71; *R. v. Waverton*: 70; *R. v. Goldsmith*: 20; *Dobson*: 232a. In these cases are found the limits of liberal construction. And also what record and parts of the record matter may be assembled to sustain the judgment or sentence at common law. 1 Gr. Ev. 19; citing MAXIMS. The rules in equity and under codes are more strict. See THEORY OF THE CASE; STORY; WAIVER; *Consensus*, etc.; L.C. 290a-299.

Three degrees of certainty have been insisted upon for judicial records. *J'Anson*: 91; *Smith, Lead. Cases*. Elsewhere we ob-

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serve that such views are not practical. Looking from the requirements of the conserving principles of procedure, it may be asked if pleadings are not always strictly construed. Lamplough: 301; J'Anson: 91. See LITERATURE; Campbell: 2; PLEADING; PROCEDURE; *Res adjudicata*; *Fabula non judicium*; *Jurisdiction est potestas*, etc.; Dovaston: 217. §§ 4, 187, Hughes' Proc.

Alder—Pleading over—by verdict—is but an application of *Ut res magis*, etc. These expressions have given very erroneous impressions in many quarters. For there are decisions and texts which show that the idea is abroad that, by pleading over matter of substance, more than form is waived (see WAIVER); and that a verdict may aid substantial defects; but this is not true. Hitchcock: 12. All that those expressions mean is that if one pleads to substance, he waives formal defects—nothing more. And so codes provide where they read that filing an answer waives all defects except that the complaint does not contain facts sufficient to constitute a cause of action. Codes are most positive and explicit as to what can be waived, and also that the confines of waiver are the same as under other systems.

Under no system is waiver intermittent and a matter of arbitrary declaration—an element of caprice or whim—but it depends on facts. And when once indicated—signified—established—it is available thenceforward, and like an election it is irrevocable and cannot be condoned or released without the consent of the adverse party and sometimes by the courts as well. *Res inter alios acta*.

Alder by pleading over, or by verdict, means that, if one is remiss or negligent about making objections and taking exceptions, he waives the error if it be waivable in character. Dobson. This is a most important rule in construing the statutory record—bill of exceptions. It is of less consequence in construing the mandatory record. See WAIVER; L. C. 290a-299.

These records have different origins, ends and purposes, and are construed from different policies. We add further matter for the reader's consideration:

- *The maxim applies to pleadings at trial and after verdict.* Kewaunee: 28. Blsh. Crim. Proc. 355, 356, 510, 1348; Swearingen, 13 Ohio, 200; 1 Chit. Pl. 682.

One good count will sustain a judgment after verdict, upon a general objection. Swearingen. Alder by verdict will often cure an error of form. R. v. Waters: 71; R. v. Waverton: 70; R. v. Goldsmith: 20; Dobson: 232a; *Talis interpretatio*, etc. Pleadings are construed as entireties. 4 Encyc. Pl. & Prac. 746, 747; cases.

Limitations of rule in construing pleadings. Dovaston: 217; J'Anson: 91; Rushton: 5; Pom. Rem. 546. Cf. with *id.* 579; Bryant, Pl. 249; 4 Encyc. Pl. & Prac. 756; *Quod ab initio*, etc.

Judgments are aided by the whole record; in pari materia; Taylor, 35 Fla. 297, 48 Am. St. 249, n. *Certum est quod*, etc.; *Verba relata*, etc. Whole record will be inspected for jurisdictional facts.

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If a judgment or a decree contains jurisdictional recitals, these will be limited by what is found in other parts of the record. Laney, 105 Mo. 355, 24 Am. St. 391; *Verba generalia*, etc.; *Interest reipublicæ*, etc. See Harrow v. Grogan.

Pleadings; first count or allegation is preferred; repugnancy or inconsistency is surplusage. 1 Chit. Pl. 231. But see Pain: 107; *Fabula*.

Admissions once made upon the record are conclusive, and subsequent denials in that or other actions are of no avail. Dickson: 34. Extra-judicial admissions; all must be taken together. 1 Gr. Ev. 201, 202.

An answer or a replication may aid a complaint is a view in many code states. Boyd: 62. In some sense this is alder by pleading over. But a bill in equity and an indictment are not aided in substance by what is elsewhere found in the record. And codes, following the equity rationale, expressly provide that a complaint or petition shall state a cause of action, and that filing an answer will not waive that essential requirement. But this provision is often nullified. Russell v. Shurtleff; *Quod ab initio*, etc.

The statutory record lends no substance to the mandatory record. The disregard of this rule of construction has brought upon several jurisdictions what is nothing less than a catastrophe to their jurisprudence.

It is the well-settled policy of courts to define and protect rights, and not frustrate or destroy them. Consequently the importance of construction appears. (See *Roe v. Tranmarr*; *Shelley's Case*.)

The validity and integrity of contracts are favored and agreeably to the maxims, Nemo præsuntur malus, Verba fortius, etc., and Concordare leges legibus, etc. Abel: 334.

If possible a contract will be rested on a valid ground, and an illegal element will be rejected. Brennan, 73 N. J. L. 729, 118 Am. St. 727.

The application of this maxim is restrained within higher laws and policies. In presentia majoris cessat potentia minoris; Salus populi suprema lex. See CHRISTIANITY; SUPREME LAWS OF THE LAND; COLLATERAL ATTACK; CONSTRUCTIVE NOTICE; DUE PROCESS OF LAW; MANDATORY RECORD; PLEADINGS; PROCEDURE; LITERATURE; Savacool: 164; Six Carpenters: 165; Starbuck: 263; Tarble's Case: 247.

Commercial paper is upheld if possible. Crooker; *Sturdivant*: 410. If possible, it will be construed as "a courier without baggage." Overton, Union Trust Co. v. Preston.

Deeds are liberally construed and against the grantor. *Roe v. Tranmarr*; 3 Wash. R. P. 357, 4th ed.; *Heaton v. Hodges*; Wilkins; Parker v. Taswell (1858), 27 L. J. Ch. 812; 2 De G. & J. 539, 8 Rul. Cas. 642; Mews' E. C. L., 1 Beach, Conts. 735. Several notes maturing at different times become due if any one is dishonored, if the contract so provides. 3 Rand. Com. Paper, 1047; Sedgk. Stat. 200; C. v. Alger, 7 Cush. 53, 89; End. Stat. 44-55. A provision in a chattel mortgage that in case of default of any part of a debt certain notes shall fall due is invalid. White, 52 Minn. 367, 19 L. R. A. 673; cases. In that case great emphasis is given the rule that a principal thing carries or controls the

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incident, and disrespect is shown for
Modus et conventio vincunt legem.

Every word must be given effect if possible.
Expressio unius, etc.; Bristow: 185; Cool.
Const. Lim. 72; 1 Beach, Conts. 709-720.
Surplusage, of course, is excluded (*Sur-*
plusagium non nocet; Russell v. Shurtleff)
unless the contract would be made in-
valid, either from illegality—or absurdity
—or nonsense, which is avoided if possible,
as elsewhere noted. Accordingly it ap-
pears why general words are often limited
by what precedes or follows. *Verba*
generalia restringuntur, etc.; Suth. Stat.
234-334.

Writing distinctively effective as compared
with print. 2 Whart. Conts. 652.

Each word, clause and part will be upheld if
possible. German Fire Ins. Co., 55 Ohio,
581; 36 L. R. A. 238; 1 Beach, Conts.
714-716, 2 Whart. Conts. 672. Every
word and part will be looked to and a
meaning sought, if possible. Stockton, etc.
Co. v. Purvis (1896), 112 Cal. 236,
53 Am. St. 210 (*Falsa demonstratio*,
etc.); 1 Beach, Conts. 709-720; C. v.
Alger (statute).

All will be looked to, and effect given, if
possible. Barnard: 108. What the par-
ties call the contract is immaterial. *Res*
ipsa loquitur; Arbuckle, 98 Tenn. 221, 60
Am. St. 864.

Consideration will be given all within
the four corners: the consideration of the
whole contract required. Jones, Construc.
210-221.

De facto corporations; acts of, upheld. What
is a *de facto* corporation. Marshall v.
Keach, 227 Ill. 35, 118 Am. St. 247-261,
ext. n.

A contract may be gathered from several
documents. Boydeli. One is not allowed
to make his contract wrongful if it can
be construed so as to have effect. *Omnia*
prosumuntur; *Nullus commodum, etc.*
Blount, 3 Jones (N. C.) Eq. 73; 2
Beach, Ev. 543; 1 Beach, Conts. 709-720.

Official bonds are valid; if they sub-
stantially comply with the statute they
may be good as a voluntary bond, if not
good as a statutory. 3 Suth. Dam. 475; 1
Beach, Pub. Corp. 309. Incidents annex
themselves by implication. *Expressio*
eorum, etc.

Fundamental principles annex themselves.
Oakley; *Verba intentione*: cases; § 147,
Hughes' Proc.

Contract may be valid in part and void in
part. Pigot's Case; Osgood, 70 L. R. A.
930-933: cases. And it may be void for
one but valid for another. Union Trust
Co.

Deeds; conveyances; descriptions of lands.
Held good, if possible. Roe v. Tramarr;
Certum est quod, etc.; 3 Wash. R. P.
357 (4th ed.); Marx. *Repugnant clauses,*
how construed. Wilkins v. Norman, post.

To illustrate, next follows a valid contract:
"Rec'd of E. \$25.00, part payment for
lots 1, 2, 3, in block 28, Case's addition to
Denver. Consideration, \$2,000.00."
Eppich; 6 Colo. 493. *Contra*: "Oct. 9,
1855. This day sold L. house and land
on B. St., in Lewiston; was struck down
to O. for \$1,200.00, one-third cash down.
H. B. Auct." O'Donnell, 43 Me. 158, 69
Am. Dec. 54; Huff. & W. Conts. 100 (ex-
trinsic evidence inadmissible to make the
latter certain); Goss: 55; 2 Kent, 556.

Last statute in point of time controls. Sedg.
Stat. 353, End. Stat. 183; 201 U. S.
424.

All within the four corners will be looked
to, and from this the true meaning will
be sought. *Verba generalia, etc.*; Boydeli:

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Cool. Const. Lim. 71-74; Suth. Stat. 3,
239; Horner; Ward, 192 U. S. 168. Sur-
ficient if the note expresses amount in the
margin in figures. Witty, 123 Ind. 411,
8 L. R. A. 365; Kincannon, 9 Yerg.
(Tenn.) 11, 30 Am. Dec. 391 (if one
part is nonsense, all will be looked to);
Coles, 8 Barn. & C. 568 (15 E. C. L. R.
282, 295); Eppich, *supra* (effect given to
each word). *To sustain a contract*, "1, 2,
8," indorsed on a note, is held a signature.
Brown: 342. Great latitude is allowed
in adoption of names and means of ex-
pression. *Id.*

In pari materia. Entire context should be
considered. See CONSTRUCTION; *Verba*
generalia, etc.; Johnson, 146 Ind. 509,
36 L. R. A. 59; C. v. Alger; *Cavendum*
est a fragmentis; Dick v. U. S., 208 U.
S. 340.

Codes are construed as a whole. Black, Int.
Stat. 363; *Concordare leges legibus est*
optimus interpretandi modus; Uno absurdo
dato, infinita sequuntur. See STATUTE.

Repugnant clauses and sections; which con-
trol. Much confusion exists as to what
precedence shall be given later sections
over former. It seems that if the repug-
nancy is irreconcilable the later clause
or section will prevail. Bish. Stat. Crimes.
62-67; Sedg. Stat. 100: cases; Suth.
Stat. 220; 2 Whart. Conts. 673. *Incom-*
patible clauses in a will, the last pre-
vail. 2 Whart. Conts. 673. *But not in*
deeds. Wilkins.

Repugnant clause, how construed. 2 Bl.
Com. 379, 380; 1 Beach, Conts. 718.
Written words prevail over figures. 1
Pars. N. & B. 27, 28. Also over printed.
Thornton, 84 Ala. 109, 5 Am. St. 337.
Last clause, proviso, condition or word
prevails. Repugnant clauses are void.
Barnard: 108.

A note with a clause that it shall never be
sued violates the note. Barnard: 108;;
Danl. Nego. Insts. 151-159; Jones, Con-
struc. 210; Bush, 2 Colo. App. 48. A
contract for one year, followed by a clause
that work shall be "satisfactory," violates.
Zaleski: 306.

Amendments to the constitution of the
United States were subsequently adopted,
and these limit and control. *Verba ge-*
neralia, etc.; Miller, Const. 105.

Repugnancy will destroy a pleading. Pain:
107.

Contracts may be valid in part and void in
part. Mallan: 373; Sprague: 236; Pigot's
Case; Whart. Conts. 233; *In pari delicto*,
etc. Chattel mortgage, if fraudulent in
part as to creditors, is in toto. Greeley,
1 S. Dak. 117, 36 Am. St. 720; Russell v.
Winne; Horton, 21 Minn. 187.

Mining law. A location for more than is
allowed is only void as to the excess.
Stem Winder Mining Co. (U. S.), 37 L.
ed. (not off. reported).

Statutes may be valid in part and void in
part. Sprague: cases; Mallan: 373; Aus-
tin; Blake; Wilson, 117 Ind. 356, 10 Am.
St. 48; Indianapolis R. R., 114 Ind. 20, 5
Am. St. 578 (instructions of court);
Birmingham R. R., 100 Ala. 662, 46 Am.
St. 92, n.; 27 L. R. A. 263; Allen, 163
U. S. 80, 84: *stated*, Fayette Co., 47 Ohio,
503, 10 L. R. A. 106, n.; Fisher v. Mc-
Girr; Miller v. Horton.

If an instrument is sealed it imports a
consideration unless it recites a considera-
tion or what it is, in which case the body
controls the presumption. Bender, 78 Ia.
283, Huff. & Wood., Conts. 87. See Sta-
ples, 62 Me. 9; Wing, 35 Me. 260. And
statutes impairing this rule are strictly
construed. *Verba intentione, etc.*: cases.
See SEAL.

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Any mark commonly employed in business transactions to denote the divisions of figures, obviously representing money, into dollars and cents, is sufficient for that purpose. *De Lashmutt*, 10 Ore. 319; *Lawrence*: 132. A tax which can be referred to a law which will support it will not be referred to one which will make it void. *Lima*, 34 Ohio St. 338. The word dollars will be supplied when the context shows that word omitted. *Hines*, 29 Minn. 77; *Hunt v. Smith*, 9 Kan. 137. An instrument in the form of a promissory note for the payment of "25.00 as per deed, 10 per cent, till paid," is a note for \$25.00. *S. v. Schwartz*, 64 Wis. 432.

Where a jury found "for the plaintiff in the sum of 1,399.48-100," it was held that the omission of the word "dollars" was not such a defect as prevented rendering judgment according to the intent of the jury, although it would have been more regular to have amended the verdict before judgment. *Hopkins*, 124 U. S. 510; cases; *Certum est quod certum reddi potest*. Intent is sought and is enforced. *Verba intentione debent inservire*; *Harper*: 218.

Where a contract is susceptible of a legal and an abridged construction, the latter is to be preferred. 1 Whart. Conts. 337. See *Harvey v. Brydges*. Illegal stipulations may be severed from legal. 1 Whart. Conts. 338.

Divisibility of insurance. 1 Whart. Conts. 338a.

The whole context, also, of the document is to be considered. 1 Whart. Conts. 555, 662. *In pari delicto*, etc. A consideration of the entire text or discourse is necessary, in order to construe fairly and faithfully. *Lieber*, *Herm*. 136; 2 Whart. Conts. 641, 662. A trust deed provided a sale should be in a county other than where the lands were situated, against a statute otherwise providing. The statute controls and the deed will be upheld. *Kerr*, 94 Tex. 641 (a valid deed may have a void stipulation).

Fraud and illegality is not favored, but is avoided if possible. 2 Whart. Conts. 654; *Union Trust Co*.

Words and phrases, how construed. *Winfield*, *Adj. Words & Phrases* (1882); *Lawson's Concordance* (1883); 1 *Beach*, Conts. 709-720. See *Verba*, etc.

Amending § 293 held to refer to § 296, else the amendment would be a nullity. *Sedgk. Stat.* 226; cases; *P. v. King*, 23 Cal. 265; *End. Stat.* 219; cases; *Falsa demonstratio*, etc.; *Winter*, 10 Ga. 190, 54 Am. Dec. 379. "I will not pay" construed to mean, *I will pay*. *Cummings*, 2 *Rawle*, 23, 19 Am. Dec. 615. See *Barnard*: 108; *Crooker*, *sub Sturdivant*: 410. Surplusage is rejected. *Utile per inutile non vitiatur*. *Benedicta est expositio*, etc. See *Russell v. Shurtleff*; *Cufus est instituere*, etc.; *THEORY*.

VACATION: Powers of judges in. *Blair*: 170; *Hake*. See **TERMS OF COURT**; *And. Dic.*

VADAKIN (or Vadikin) v. SOPER: L.C. 11.

VAIDEN v. C.: L.C. 155.

VALE v. IGLEHART (1873), 69 Ill. 332, 335. *Cited*, §§ 125-127, Gr. & Rud.

VAIN AND FRUITLESS THINGS ARE never required. *Lex neminem cogit*, etc.; *Suth. Stat.* 330, 331, § 54, Gr. & Rud.

This is an important maxim, and it may be cited against prolixity, surplusage and useless acts and proceedings. See **DEMAND**. *New Trial*; *Lex est ratio semina*, etc. It is justly and necessarily respected in procedure. See **LITERATURE**. All ra-

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tioned and perfected systems must exclude surplusage. See **SURPLUSAGE**.

VAN CLEAF v. BURNS: L.C. 17.

VANDENBURGH v. TRUAX (1847), 4 Den. 464, 47 Am. Dec. 268, 272, n. *Cool*. Torts, Pars. Conts., Bro. Max., *Suth. Dam.*, 38 Am. St. 846, 847 (one with a pick-axe chasing a negro boy and causing him to do damage in his flight for safety is liable). *Squib Case*; *Wat. Tres.*; *Moak*. Torts, 211, *Wood. Nuis.*, *Whart.*, *Thomp. Neg.*, *Bigl. L. C. Torts*, 134 N. Y. 478, 18 L. R. A. 388; *Vallo*, 147 Pa. 404, 14 L. R. A. 743, n. (injury caused by jumping to escape a hurled trunk); 3 *Sm. Lead. Cas.* 1817, 1849, 9th ed.; notes to *Vicars*; *Guille*. § 348, *Hughes* Proc.

VANDEVENTER v. GOSS (1905), 190 Mo. 239-246. *Cited*, § 53 (Convenience), Gr. & Rud.

Appellate procedure; abstracts of record; essentials of; necessity for and convenience of. From necessity, convenience and reason appellate courts must be properly aided by counsel who have managed, controlled, studied and developed the case. *Gibler*: 96; *McArthur*: 99. They must file real, substantial and truly useful abstracts; these must be sufficient within themselves, without further aid or perusal or supplement by the adverse side or this court, at least to present a case for review. The onus is on the appellant to show error and he cannot shift this duty on the adverse side or this court. *McClellan*, 19 Mo. 495 (court in a civil case enforces the rule).

From necessity and convenience an appellate court must be aided by counsel and by the means presented, not only by statute, rules of court and decisions, but also by reason to gather the matter in voluminous records upon which judgment must be passed. From necessity courts must make and vindicate imperative rules for the conduct of their business. The establishment of such rules is a judicial question. Legislatures may regulate and make uniform but they cannot go further. § 63, Gr. & Rud.; *Kollock v. Scribner*.

Appellate procedure is governed by the grounds and rudiments of law. § 53, Gr. & Rud.

Verba fortius applies to all pleadings; courts will not assume facts and proceed upon such assumptions and give judgments upon them. *De non*; *Hale v. Henkel*.

VAN HOUTEN v. MORSE (1894), 162 Mass. 414, 44 Am. St. 375, ext. n., 26 L. R. A. 430, n.

Marriage contract; effect of fraudulent concealment. See **BREACH**; **RESCISSION OF CONTRACTS**; **CANCELLATION**; **DECEIT**. *Evidence to prove the engagement*. *Wightman v. Coates* (1818), 15 Mass. 1, 8 Am. Dec. 77-80, n., 2 Pars. Conts. 66, Ans. 72, *Chit.*; 3 *Suth. Dam.*; *Jenkins*; *Strathmore*. *Justification for breach of*, *Willard v. Stone* (1827), 7 Cow. 22, 17 Am. Dec. 496-498, n., *Suth. Dam.*, *Sedgk. Dam.*, Pars. Conts., *Chit. Bish.*, *Smith*, 194, *Whart.* 73; 3 *Ency. Pl. & Pr.* 683-694. Unchastity of female learned after promise is ground for rescission. *Foster*, 68 Vt. 318, 54 Am. St. 886, n. See **BREACH**; *Pasley*: 375. Infirmities, like an abscess, are grounds for a rescission. *Atchison v. Baker*, *sub BREACH*; *Shackleford*, 93 Ky. 80, 40 Am. St. 166-176, n. 15 L. R. A. 531, n. (relapse of syphilis excused). *Contra*: *Hall*

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v. Wright (1858), El. Bl. & El. 746 (96 E. C. L. R.), 2 Sedg. Dam. 637-641, n. 3 Suth. 983, 984. But non-contagious syphilis is no ground for divorce. Vondal, 175 Mass. 383, 78 Am. St. 502. Marriage, when a nullity. Greenhow, 80 Va. 636, 57 Am. Rep. 603-610, n.; Gathings, 5 Ired. Law, 487, 44 Am. Dec. 49-57, n.; Trammell, 158 Mo. 214, 51 L. R. A. 864, n.

Rescission of contracts. Bish. Conts. 679-680.

What disease will excuse from marriage. Smith, 67 N. J. 548, 58 L. R. A. 480, n. **Tuberculosis will.** Grover v. Zook, 44 Wash. 489, 64 Cent. L. J. 451-458, ext. n.

VAN LEUVEN v. LYKE (Omitted allegations are not waived by appeal and may be assigned for error for the first time in the appellate court. Campbell: 2): L. C. 14.

VAN LYKE v. TREMPEREAU COUN-ty Ins. Co.: L. C. 177.

VAN VOORHIS v. BENTHALL (1881), 86 N. Y. 18, 40 Am. Rep. 505-519, 21 Am. Law Reg. 9-29, ext. n., 13 Cent. L. J. 349. **Ror. Interstate Law,** 242, 248, Mech. Ag. 305, 2 Pars. Conts. 706.

Lex loci contractus. A marriage, if valid where made, is valid everywhere. Dalrymple, 2 Hagg. Conts. Rep. 54: stated, Bro. Max. 520.

And this is the general rule of all contracts. Robinson, 87 Tenn. 445, 10 Am. St. 690, n. 2 Gr. Ev. 460, 3 L. R. A. 523, 702, n.; McGarry, 110 Ala. 559, 55 Am. St. 40-55, n.; Wilson, 150 N. Y. 314, 55 Am. St. 680, n.; Hills v. S. (1901), 61 Neb. 589, 57 L. R. A. 155-173, ext. n., Eddy, Comb. 143.

Conflict of laws. Ror. Int. Law, 60-115, 1 Jones, 656-663. **Nine rules stated:** 1 Danl. Nego. Insts. 865, 1 Rand. 20-60. **Six rules stated:** 2 Pars. 324, 327. Hutch. Carr. 144a, 1 Chit. Conts. 128-135, Bish. 1368-1412, 1 Add. 238-241, 1 Beach. 584-615, Jones, Construc. 21-31, 2 Kent. 453-459, Gist, 45 S. C. 344, 55 Am. St. 763-778, ext. n. (enforcing a contract abroad); Murphy, 121 Mass. 6; Ruhe, 124 Miss. 178, 46 Am. St. 439-457, ext. n. (contract if valid where made is everywhere); Ford, 6 Bush (Ky.), 133, 99 Am. Dec. 663-675, ext. n. (void where made is void everywhere); Liverpool v. Ins. Co., 129 U. S. 397, 458; Arayo, 1 La. 528, 20 Am. Dec. 286-294, n. **Wrongs abroad;** what are transitory. Mostyn: 274. **See VENUE.** Adoption of children under statutes of one state. Notes to 39 Am. St. 229-231.

The law controlling the contract. 3 Page, 1716-1740.

The remedies to be pursued on contracts are governed by the law of the forum. Swedish Bank, 89 Minn. 98, 99 Am. St. 549, n.; 3 Page, 1716-1740.

Right of action for negligence given under the laws of another state may be sued elsewhere. Attrill, 70 Md. 191, 14 Am. St. 344-355, ext. n., 2 L. R. A. 779. Bish. Torts, 1281: cases; Alabama R. R. 97 Ala. 126, 38 Am. St. 163, n., 9 L. R. A. 388 (allowed where statutes are the same); *Actio personalis*, etc.; Whitlock v. Nashville R. R.

Statutes of limitations belong to lex fori generally. Lamberton, 94 Me. 508, 80 Am. St. 415, n. But if barred where contract arose, it is barred everywhere. Notes to 80 Am. St. 426; Nat. Bk., 129 Mich. 434, 64 L. R. A. 119-126, n.

Statute of frauds. Winward, 23 R. I. 476, 64 L. R. A. 160-179, ext. n. (*gambling*); Snider, 112 Tenn. 309, 64 L. R. A. 353 (*chattel mortgages*); Succession of Welsh

Van Voorhis.—

(1904), 111 La. 801, 64 L. R. A. 801. (Sales of personality). **Variance.** Sufficient to prove substance of the issue.

When statute of limitations will govern action in another state or country. Brunswick, 99 Fed. 635, 48 L. R. A. 625-644, ext. n.

Insurance contract: place of. Grevening, 112 La. 879, 104 Am. St. 474-482, n.; Presbyterian, 126 Wis. 281, 110 Am. St. 919.

Contracts of a married woman if valid where made are valid everywhere. Whart. Conts. 79.

Interest and usury; law of place relating to. U. S. Savings, 137 Ala. 119, 62 L. R. A. 33-81.

VARIANCE: A departure is where a subsequent pleading introduces an irrelevant subject-matter. A variance is where the mandatory record shows that one subject-matter was to be proved and the statutory record shows that another was proved.

§ 1. *That there shall be no departure, is a general rule of pleading.* "And you must prove the charge as laid," was the manner of the Romans. *See STORY.* In later times the rule is the same, but is thus expressed: *Allegata et probata* must correspond (Bristow: 135), or the proofs must correspond with the allegations and be confined to the point in issue. *Frustra probatur quod probatum non relevat* is a part of the prescriptive constitution and must ever be respected. *See THEORY OF THE CASE.*

1 Gr. Ev. 51, 63-65; 2 *id.* 7; 3 *id.* 10. *See Res adjudicata*; 16 Cyc. 403-406 (Equity); 1 Ell. Ev. 194-204; Sto. Pl. 10; **RELEVANCY OF EVIDENCE.**

§ 2. **VARIANCE, THEORY OF THE CASE,** *Verba fortius accipiuntur contra proferentem.* CODES and CONSTRUCTION should be connectedly considered. *See also CONSERVING PRINCIPLES*; §§ 83-123, 171-262, Gr. & Rud.

§ 3. **Variances result from an application of the theory of the case. See THEORY.** The doctrine of, should be traced from Bristow: 135; Wabash: 137; Eddy: 136; Citizens' Street R. R. v. Stockdell: 186; Perry: 136a, and C. v. Roby: 74: cases. §§ 272, 278, Gr. & Rud.

Oppose *Frustra probatur quod probatum non relevat*, *Expressio unius, De non apparentibus* and cognate basic maxims.

Forbidden by the rule: *Allegata et probata* must correspond. *Frustra probatur; De non apparentibus.* § 225, Gr. & Rud. *See THEORY.*

§ 4. **Variances and departures are destructive of the basic use of pleadings to support the conserving policies.** For instance, it is destructive of collateral attack, constructive notice and *Res adjudicata.* § 225, Gr. & Rud.

Also of essential certainty. *See CERTAINTY.* §§ 91, 124a, 205, 224, 225, Gr. & Rud.

Establishment of, jumbles the uses of the mandatory record and the statutory record. This implicates the basic rule of evidence upon which depends a constitutionalism, namely, the record rule, *what ought to be of record, etc., also Frustra.*

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Cannot be waived. §§ 56-61, 76, 108, 136, 158, 205, 225, 312, Gr. & Rud.
 Departures forbidden. §§ 76, 108, 158, 182, 219, 223-225, Gr. & Rud.
 Destructive of *res adjudicata*. § 182, Gr. & Rud. What is not juridically presented cannot be judicially considered.

§ 5. Other crimes incompetent and prejudicial. *Topolewski v. S.*, 130 Wis. 244, 118 Am. St. 1019. See SYSTEM; Strong v. S.: 213a; P. v. Molineux.

§ 6. Variances are obnoxious to the conserving principles of procedure (§§ 83-123, Gr. & Rud.), and in all systems alike. They are no more to be tolerated in the civil than in the criminal case. 1 Gr. Ev. 63, 65; C. v. Roby: 74; Guedel: 74a. This proposition should be well comprehended. Many cases deny it.

If one brings suit relating to Blackacre, in no way possible can he change this to Whiteacre, without introducing an entirely different cause of action. Where judicial records impart constructive notice to the whole public of what is in litigation, that notice must be properly given, and by the right initial pleading, in the mandatory record. *Quod ab initio*, etc.

§ 7. Departures and variances tend to defeat requirements for constructive notice, removal of causes from state to federal courts, and other high policies. Out of consideration for these, variances are forbidden. The law of variance involves several leading maxims of procedure, viz.:

Frustra probatur, etc.; *Expressio unius*, etc.; *Verba fortius*, etc.; see CERTAINTY; WAIVER; SUBJECT MATTER; Dorn v. Farr; Guedel: 74a.

§ 8. Limits of legislative power to authorize variances. This question must be viewed from the conserving principles of procedure and their requirements. Generally, legislatures cannot impair or destroy these.

See RULES OF COURT; WAIVER; STATUTE; CONSTITUTIONAL LAW; POLICE POWER; pp. 8-17, Hughes' Proc.; §§ 56-61, 83-123, 136, Gr. & Rud.; Huntsman: 231; Russell v. Shurtleff; *In presentia majoris*.

§ 9. Pleadings, among other things, limit issues and narrow proofs. Consequently they are made to exclude departures and variances; and courts cannot therefore authorize the latter without practically abolishing pleadings, which is impossible in a constitutionalism. *Hale v. Henkel*.

See DUE PROCESS OF LAW RECORD; MAXIMS; PLEADINGS; RECORD; CERTAINTY; *Res adjudicata*; Windsor: 1; Kollock v. Scribner; Sanborn v. Sanborn; Gay v. Winter: 138; Perry: 136a; also

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L.C. 1-21, 214-233: cases; *Verba intentione debent inservire*.

What is not alleged cannot be proved. *Harrison v. Nixon*, sub *Garland*: 60; cited, 195 U. S. 133; *Frustra probatur*, etc.; R. v. Solomons; Huntsman: 231.

§ 10. Pleadings narrowly defined; consequences. It is well to note that where pleadings are narrowly defined, there variances are most liberally tolerated. Where pleadings are defined merely to give notice to the adverse side, then it is often held that a variance, unless it is aptly excepted to, is waived. See ILLINOIS.

§ 11. Appellate procedure to correct. An appellate court must review the identical thing that was viewed and passed on by the trial court. "A court of appellate jurisdiction only" can pass on no other. Relating to this, constitutional law is involved.

§ 12. If, from the mandatory record, it appears that the pleadings conferred jurisdiction of one thing, but that above and out of these the court acted upon and viewed another, then no objection or exception is necessary. A dictum does not bind. *Cohens*: 244. On principle, a review court *sua sponte* takes notice of such usurpation or abuse of power whenever called to its attention. The assignment of errors is not indispensable for such grave jurisdictional error. To illustrate, if Blackacre was sued for and the court entered judgment for Whiteacre, then the statutory record, the objection and the exception are unnecessary. But where the mandatory record does not show the variance, then the statutory record is essential, and, as a rule, wherever it is required there must be the objection and the exception, also the assignment of error. § 53 (Convenience), Gr. & Rud. Still, on principle it is sufficient to show to the reviewing court that the trial court acquired jurisdiction of one thing and then considered and passed upon another. This is more obnoxious to the due administration of the laws than admitting hearsay evidence, which need not be objected to. *Shutte*: 291.

§ 13. Generally, grave jurisdictional defects need neither objection nor exception. They may be raised as is the general demurrer, in any way and by anyone, even the *amicus curiæ*.

Variance between allegation and proof is not material unless it leads the adverse

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party to his prejudice. *Ranchau*, 71 Vt. 142, 76 Am. St. 761, n.; *Jordan*, 42 W. Va. 312, 57 Am. St. 859-869, ext. n. (illustrations which offend constructive notice); *Lockhart*, 195 U. S. 427, 432; cases. See *C. v. Roby*: 74; *Guedel*: 74a; SUBJECT-MATTER; DESCRIPTION; ALLEGATIONS.

- § 14. *Illustrative Cases*: Cancelling a deed to land described as a "sand-bar" or "piece of ground," or as a "piece of middle ground," is sufficient to include the term "island," when the proofs show that the land in dispute is an island. *Butler v. R. R.* (1891), 85 Mich. 246, 24 Am. St. 84.

3. It is insisted by the defendants that the theory of complainant's bill is, that this was not an island at the time of the original grant; that the proofs show that it was an island; and that, therefore, the complainant has made no case for relief. We think this is too technical a construction of the rules of pleading in equity courts. It is described in the bill as a 'sandbar,' or 'piece of ground'; again, 'a piece of middle ground,' and again as 'middle ground.' We think this description broad enough to include the term 'island,' even if the proofs should justify that description. The defendants have not been prejudiced or surprised, and, if the defendants were technically correct, an amendment would be granted in this court to conform to the proofs."

Attention is drawn to the passage: "We think this is too technical a construction of the rules of pleading in equity courts." (See *Sto. Pl.* 10, 790-794.) Also to this one: "The defendants have not been prejudiced or surprised, and if the defendants were technically correct, an amendment would be granted in this court to conform to the proofs."

- § 15. "Courts of appellate jurisdiction only" must confine their review to the identical matter viewed below, which must be described in the pleadings. See JURISDICTION; APPELLATE PROCEDURE; SUBJECT-MATTER.

- § 16. It would be destructive of constructive notice and other conserving principles of procedure to permit an amendment, describing a different thing from that in the original statement. There are limitations of the right to amend. *Walden*: 139.

Departures may be waived. *McIntire*, 31 Colo. 246. *Contra*: *Adams v. Gill*; *Harrigan*, sub *MAGNA*.

Averment of an express promise is sustained by proof of an implied promise. *Pence*, 11 Ind. Ap. 263, 54 Am. St. 505, n.; *contra cases*; *Bristow*: 135. See DEPARTURE; *Herschbach* (1904), 207 Ill. 517, 99 Am. St. 233 (oral evidence admissible to prove issues). See *Israel*: 83; cases; *Mondel*: 77; *Iverslie*: 46; *Huntsman*: 231; *Bates*: 225.

- § 17. Code provisions that are cited and relied upon as excluding the great maxims of procedure enumerated in relation to THEORY OF THE CASE are next quoted: "In the construction of a pleading for the

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purpose of determining its effect, its allegations shall be liberally construed with a view to substantial justice between the parties."

"The court shall in every stage of an action disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect. If, upon the trial of any action, the evidence shall vary from the allegations of the pleadings, and either party is surprised thereby, he shall be allowed on motion and showing cause therefor, and on such terms as the court may prescribe, to amend his pleadings to conform to the proofs."

"The provisions of this act shall be liberally construed, and shall not be limited by any rules of strict construction. The rule of the common law that statutes in derogation thereof are to be strictly construed has no application to this code. Its provisions and all proceedings under it shall be liberally construed with a view to promote its object and assist the parties in obtaining justice." See 1 *Bates' Pl., Prac., Parties and Forms*, 511, 512; 2 *Thomp. Tri.* 2310, 2311; *CODES*; *RES ADJUDICATA*; *Dovaston*: 217; 1 *Nash, Pl. & Pr.* 511 (*Sibley*).

The municipal court act for Chicago reaffirms the above provisions in a varied language. See ILLINOIS; *Mallinckrodt*: 12a; *THEORY*.

- § 18. *Transcendent construction of codes.* §§ 134-262, *Gr. & Rud.* Under the statutory rule of construction some courts have construed their right to sail without star, compass or sextant in an uncharted sea, and, so to speak, with letters of marque and reprisal, and with powers to declare acts of omission or commission to constitute a cause of action and predicate the requirements of this upon acquiescence or waiver, the evidence of which must be proved in any way, unless the statutory record is filed.

From requirements of a constitutionalism no greater engine of recondit, insidious oppression was ever designed than appears from the foregoing. Such a procedure is but a refined form of an absolutism. From this viewpoint may be seen the support that a few great maxims give to a government of protection.

Some codes have extended sections regulating construction and variances. See *MISSOURI*; *ILLINOIS*; *Franklin Lodge*; *Mallinckrodt*: 12a (court statement of the rule, cases; *THEORY OF THE CASE*); *JEOPARDS*.

- § 19. *Viperous construction of codes.* The student of codes should be apprised of the condition of code glosses that are nothing more than conglomerated parrotism and presumptuous egotism. The literature on the subject may justly be compared to the lower road with miry holes. Many of these will impede, indeed they defy progress and a mastery of code principles; writers have attempted to discuss these who were profoundly ignorant of the basic

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principles of procedure (§§ 56-61, 136, Gr. & Rud.); they did not understand the few and simple canons upon which all codes and practice acts are devised; nor did they understand the conserving principles and the rules upon which they depend. §§ 83-123, Gr. & Rud; "The Lawyer's Ignorance of the Law," 90 *Outlook*, 19-23, Sept. 5, 1908, by Everett W. Abbot, of the New York Bar. It is due to the student sufficiently to illustrate these facts. The condition of code literature may be judged from puzzling sections, specimens of which are next quoted:

§ 20. Puzzle No. 1:**(A) Code and Comments.****"1. Code provisions. R. S. § 5294.**

When material; amendments. No variance between the allegation in a pleading and the proof shall be deemed material unless it has actually misled the adverse party to his prejudice, in maintaining his action or defense upon the merits, and when it is alleged that a party has been so misled, that fact must be proved to the satisfaction of the court, and it must also be shown in what respect he has been misled, and thereupon the court may order the pleading to be amended upon such terms as are just. (Old Code, § 131.)

"§ 5295. When not material; amendment without terms. When the variance is not material the court may direct the fact to be found according to the evidence and may order an immediate amendment without costs. (Old Code, § 132.)**"§ 5296. Failure of proof when the allegation of the claim or defense, to which the proof is directed, is unproved, not in some particular or particulars only, but in its general scope and meaning, it is not deemed a case of variance within the last two sections, but a failure of proof. (Old Code, § 133.)****"2. Common-law and code rules distinguished. Under common law pleadings matters of essential description must be strictly proved as alleged and matters of substance only substantially proved. Matters of essential description concerned the identity of the contract, but only the legal and not the natural identity was meant—that is, identity concerning the particulars in their nature essential to the action—failure of proof or variance as to other particulars being of no importance.****Variance.—**

Matters of substance referred to those which in *point of law* were essential to the claim.

"Under the code no variance is material unless it has actually misled the adverse party to his prejudice on the merits and no allegation is material unless essential to the claim or defense.

"The evident object of the code is to vest in the court a discretion, where it can be done without surprise or injury, to try the case on the evidence outside of the pleading, and if objection be made to allow the pleadings to be conformed to the evidence at once and without terms, and when there is no objection to refuse to reverse on account of the variance. *Hoffman v. Gordon*, 15 O. S. 211, 218; *Larimore v. Wells*, 29 O. S. 13, 17; *Bacon v. Daniels*, 37 O. S. 279, 281."

"(B) Material and Immaterial Variances and Failure of Proof Distinguished.

"Cases of discrepancy between proof and allegation might be stated as of three classes, thus: Immaterial variances; variances deemed material in case the party proves he is misled; and cases where the court will assume, as a matter of law without proof, that he is misled; the latter being called failure of proof; i. e., restating the last two classes; material discrepancies are of two kinds, viz., those not assumed, but probable to be such, and those material *per se*.

"Some, perhaps most, authorities consider that a failure of proof occurs only when a different cause of action is proved from that which is pleaded. While a few seem to go farther and regard identity of the transaction as the test.

"In case, however, the discrepancy amounts to a failure of proof, i. e., where it goes to the general scope and meaning of the allegation, and not in some particulars only, it is not easy to ascertain whether the defect is curable or not, or whether it is waived by not objecting.

"In case of failure of proof it is of no consequence whether the other party was misled by it or not; if he objects to the evidence it must be excluded; its admission is error, and he need not show that he was misled. *Hill v. Supervisors*, 10 O. S. 621; *Thatcher v. Heisey*, 21 O. S.

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668. Cf. also *Dean v. Yates*, 22 O. S. 388, 397; *Reynolds v. Morris*, 10 O. S. 510; *Curtis v. Outter*, 7 Neb. 315." 1 Bates, Pleading, Practice, Parties and Forms, 511-512; *VARIANCES AND AMENDMENTS*, id. 511-568.

§ 21. *Puzzle No. 2:* (It seems well to direct attention to the fact that the authorities cited to support the text matter do not relate thereto.)

"§ 2310. *View that the Jury Should be Instructed upon the Case Made by the Evidence Although Variant from the Issues Made by the Pleadings.*—This view ignores a principle which obtains in almost every situation in a civil trial, that the court is to disregard at every stage of the trial those errors or irregularities which it is competent for the party to waive, and which the party against whom they are committed does not object to at the time. The object of pleadings being merely to *notify* the opposite party of the ground of action or defense, if the party comes into court, it is not perceived why he may not *wave* the notice as in every other case, although the pleading may not advise him of the case or defense which is actually tendered in the evidence. Several of the best courts in the country proceed upon this enlightened view.¹ The sound view is believed to be that the instructions have no connection with the pleadings, except *through* the evidence. The jury 'find from the evidence,' and not from the pleadings. The pleadings are intended to apprise the opposite party of the ground of action or defense, and to guide the court in admitting or rejecting evidence. The jury have nothing to do with them;² are not permitted to take them to their room when they retire; and it is unprofessional for counsel to comment on them to the jury, nor should the judge permit it to be done. Suppose, then, that facts come out in the evidence *broad*er than those alleged in the pleadings, or otherwise *varying* from them. Is the judge to instruct the jury upon the whole evidence, or is

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he to limit his instructions to so much of the evidence as is within the scope of the pleadings? The proper answer is believed to be this: If neither of the parties has objected to the evidence on the ground of variance, the judge is to instruct the jury upon the whole evidence; the rule being, that a variance between the pleadings and the evidence is no ground of error, unless the evidence was objected to on this ground at the time it was offered. If, however, the variance is such as to leave the pleading substantially unproved, then, as in any other case where the claim, or the defense, is unsupported by the evidence, the judge will not direct a nonsuit, or instruct the jury to find against the party who has the burden of proof. But this danger can never arise, if the case has been properly tried, down to the point of time wherein it becomes necessary to charge the jury; for in this case no evidence, not in conformity with the issues, will have been admitted, or, if inadvertently admitted, will be excluded from the consideration of the jury by the court in instructing them to disregard it. The rule, frequently laid down, that instructions should be *pertinent to the issue*, does not, it is believed, impugn the foregoing views; for this expression is used with reference to the assumption that the evidence conforms, as it should, to the issues made by the pleadings. With this qualification, the meaning of the expression becomes nothing more than that which is more frequently used,—that the giving of *abstract instructions* is error.

"§ 2311. *In Such Case the Court May Direct the Proper Amendment.*—If it is absolutely necessary that the pleadings, the object of which is to notify the opposite party *in advance* of the ground of action or defense which will be set up, should, after such evidence is in without objection, be amended to make them conform to the evidence—a principle the very suggestion of which is nonsense, since there is no sense in writing a formal *notice* in order that a person may be informed of what he already *knows*; yet, if it is necessary, it is held that the trial court should direct the proper amendment in order to make the pleading conform to the evidence." 2 Thomp. Tri., §§ 2310-2311.

1—*Bowers v. Thomas*, 62 Wis. 480; *Walker v. Ebert*, 29 Wis. 194; *Kellogg v. Steiner*, id. 626; *Butler v. Carns*, 37 Wis. 61; *Chipman v. Tucker*, 38 Wis. 43; *Roberts v. McGrath*, id. 52; *Roberts v. Wood*, id. 60; *Griffiths v. Kellogg*, 39 Wis. 290; *Taylor v. Atchison*, 54 Ill. 196; *Wait v. Pomeroy*, 20 Mich. 425; *Burson v. Huntington*, 21 Mich. 415; *Whitney v. Snyder*, 2 Lans. 477.

2—*Post*, § 2314.

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§ 22. *Pertinent questions.* What would the jurists of Rome (Justinian), of the Norman, the English (Mansfield) or the federal (Marshall, Story, Field or Waite) say of *Puzzle No. 1*, which in substance is like *Puzzle No. 2*? See *STORY*; *Frustra*. Upon what authority were the commands of antiquity, the condensed good sense of nations, of great empires, denounced? Can a rational, protecting jurisprudence be erected in disregard of fundamental maxims? This question is squarely submitted and discussed in the *Grounds and Rudiments of Law*, Vol. I.

Did the writer of the above puzzle understand the cases he cited? Do they sustain his assumptions as to the point that pleadings can be waived? Is the new definition of pleadings acceptable? 67 C. L. J. 393.

Did the writers of these puzzles have in view the prescriptive constitution? Did they understand the Mandatory Record and its distinctive functions from the Statutory Record? Can intellects ignorant of the origins and functions of those records exploit a branch of the law upon which all branches depend?

§ 23. *These puzzles can be cited to sustain these propositions:* There can be departures; there can be variances; *allegata et probata* need not correspond. The clerk and his record may be construed out of the scheme of government. See *THEORY OF THE CASE*; *DIVISION OF STATE POWER*.

The ways of an absolutism may be adopted in constitutional courts. A court is not bound by its record. §§ 56-61, 136, Vol. I, Gr. & Rud. Every presumption is in favor of a pleader. *Dovaston*: 217. See *VARIANCE*.

The means of *res adjudicata* can be abolished; also the protection devised by the means of collateral attack; the ground of the general demurrer can be waived, also of the motion in arrest of judgment; a judgment calls for nothing more than a mere judgment entry, and possibly the Statutory Record (bill of exceptions, if this was filed).

The allegation, admission of record, the denial and the issue are formal matters, are mere matter of form and may be waived and parted from at any moment. A cause of action must be picked out and put together from the evidence, not from the Mandatory Record. See *WAIVER*.

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Jurisdiction of a cause of action attaches to what is picked out of the evidence that is admitted without objection. Legislatures can abolish the essential means of the judiciary. The record as a bulwark of protection against the ways of an absolutism may be legislated away, construed away and consented away.

At this point it seems well to observe that a comprehension of the grounds and rudiments impresses the fact that the old fundamentals are still the law and cannot be departed from, and this shows the fallacy of the above *Puzzle No. 2*, and that it is as incomprehensible as *Puzzle No. 1*. From these will appear the mystery of the Code.

§ 24. Sections like the above may possibly be appropriately called American law; for they are not Roman, Norman or English. §§ 111-119, Vol. 1, Gr. & Rud. See *Harrow*; *ILLINOIS*.

§ 25. *Practice Consideration:* Variance, when fatal. *Wilson v. Codman* (1805), 3 Cranch, 193 (stating and citing *Bristow*: 135 three times and distinguishing it). *Bristow* and *Codman* are cited, 2 Thomp. Tri. 2256. The former is thought to be a Michigan case, also erroneously stated to be denied. But on the contrary it was approved in *Codman*, wherein the averment was surplusage, was immaterial. 1 Gr. Ev. 63. That section was written from a viewpoint afforded by the Missouri cases. See *MISSOURI*. §§ 2310, 2311, 2 Thomp. Tri., will impress the reader of the freedom that authors sometimes take with fundamental principles. Mr. Thompson never showed any respect for the fundamental maxims of procedure. See *CODES*; *Frustra*; *De non*. He often cited cases which he never examined. This will appear from the cases cited in the first note to § 2310. The careless spelling and citing of *Bristow* also tends to sustain the last statement.

§ 26. *The cause of variances is the theory of the case. These involve the power of a court to receive evidence not authorized by the pleadings.* *Fish v. Cleland* (Ill.): 12c; *Chitty v. R. R.* (Mo.); *Wasatch Co. v. Mining Co.* (1893), 148 U. S. 293-300 (irrelevant evidence waived); *Grayson v. Lynch* (1896), 163 U. S. 468. *Frustra probatur quod probatum non relevat* is denied in *Wasatch* and *Grayson* cases. See *Bragg* and *Mellor* (Mo.).

Departure must be objected to. *McIntire v. Schiffer*, 31 Colo. 240; *Fish v. Reed*, 32 Colo. 506, 522. Variances are permitted.

Objections to, must be specific, else they are waived. *Zellers v. White*.

Must be objected to, else it is waived. *Wabash*: 137; *Dorn v. Farr*; *Mulligan*, 32 Colo. 409. *Contra*: *Moynahan v. P.* Of course, the mandatory record must show no material departure. *Garland*: 60; *Windsor*: 1. See *Shutte*: 291. But variances and departures in the mandatory record need not be excepted to. *Rush-*

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ton: 5. *Contra*: No. 5 Min. Co., 4 Colo. 293. See Hume.
Amendments may cure. Wabash R. R.: 137; But where pleadings may be waived amending is immaterial.

Generally: Bouv. Dic.; Bliss, Pl. 396, n.; McClain, C. L., q. v.; Bristow: 135; Starbuck: 263; *Actore*; APPELLATE PROCEDURE; Rees: 334; *Non hæc in fœdera veni*; C. v. Roby: 74; Guedel: 74a.

§ 27. *Contradictory allegations in the pleadings are fatal*. Pain: 107. *A fortiori* if the charge as laid is not sustained by the proof. But see THEORY. The contradiction of the pleadings on principle is also destructive. See THEORY.

VASSE V. SMITH: See INFANTS; Craig, 110 Mo. 584, 19 Am. St. 569-726; cited, § 55, Hughes' Confs.

VAUGHN V. MENLOVE (setting out fire): Fent; Salisbury.

VAUGHN V. TAPP VALE R. R.: See Fent.

VENDOR AND VENDEE: Warv. Vendors; 1 Beach, Confs. 341-360. See REAL ESTATE; DEEDS. Under a contract to sell, who must make and tender deed. Note to 50 Am. Dec. 673; Poole, 6 M. & W. 835, 841, 9 D. C. P. 300, Mews' E. C. L. (in England vendee must).

Vendor must tender deed. Lefferts, 217 Pa. 299, 118 Am. St. 913.

Breach of contract to convey. Arensten, 122 Wis. 167, 106 Am. St. 951-978, ext. n. See SPECIFIC PERFORMANCE.

Vendor's right to possession when vendee fails to make payment. Brixen v. Jorgensen (1904), 28 Utah, 290, 78 Pac. 674, 107 Am. St. 720-731, n.

Marketable title; what is. Howe v. Coates (1906), 97 Minn. 385, 4 L. R. A. (N. S.) 1170-1180, ext. n.

VENDOR'S LIEN: 2 Warv. Vend. 675-711; 3 Dev. Deeds, 1231-1272; 12 L. R. A. 187-189.

Vendor's lien of personality. 83 Am. St. 445-458.

VENGEANCE: Private right of. McClain, C. L. 2.

VENUE: Right venue must be laid. Mostyn: 274; R. v. Lewis: 173; C. v. Macdon: 172; Harkness: 152; McClain, C. L., q. v.

Crimes are domestic; are not transitory. R. v. Keyn: 171. *Venue in*. R. v. Keyn. *Need not be proved beyond a reasonable doubt*. Wilson v. S.; Clarke v. S. (1885), 78 Ala. 474, 6 Am. Cr. R. 525 (may be waived).

Of contracts. See Mostyn: 274. *Of real action*. Mostyn: 274. *Of crimes*. See *Id.* *Of statutory rights*, see *Actio personalis*, etc.; Van Voorhis.

Generally: 2 Bouv. Dic. 1190.

VERBA ACCIPIENDA SUNT SECUNDUM SUBJECTAM MATERIAM: Words are to be interpreted according to the subject-matter. 6 Coke, 6, n. Subject-matter controls construction. See SUBJECT-MATTER; Cohens: 244.

Verba accipienda ut sortientur effectum: Words are to be taken so that they may have some effect. 4 Bacon's Works, 258. *Ut res magis*, etc. See *Verba*, etc.; WORDS; CONSTRUCTION; *Verba offendi*, etc.; ABSURDITY.

Verba æquivoca ac in dubio sensu posita, intelliguntur digniori et potentiori sensu: Equivocal words and those in a doubtful sense are to be taken in their best and most effective sense. 6 Coke, 20. See WORDS; CONSTRUCTION.

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Verba aliquid operari debent—debent intelligi ut aliquid operentur: Words ought to have some effect—words ought to be interpreted so as to give them some effect. 8 Coke, 94. See WORDS; CONSTRUCTION; *Verba fortius*, etc.; 2 Page, Confs. 422; 2 Cyc. 689-691.

Verba aliquid operari debent, verba cum effectu sunt accipienda: Words are to be taken so as to have effect. Bacon, Max. Reg. 3, p. 47; 35 Wis. 516. See WORDS; CONSTRUCTION; *Ut res magis*, etc.; *Verba cum*, etc.; Russell v. Shurtleff.

Verba artis ex arte: Terms of art should be explained from the art. 2 Kent, 556, n. See EXPERTS.

Verba cum effectu accipienda sunt: Words are to be interpreted so as to give them effect. Bacon, Max. Reg. 3. See *Verba aliquid*, etc.; Russell v. Shurtleff; *Verba debent*.

Verba currentis monetæ tempus solutionis designant: The words "current money" refer to the time of payment. Dav. 20.

Verba debent intelligi cum effectu: Words should be understood effectively. 2 Johns. Cas. 97, 101. See WORDS; *Verba cum*, etc.

Verba debent intelligi ut aliquid operentur: Words ought to be understood that they may have some effect. 8 Coke, 94a. See WORDS; *Verba cum*, etc.

Verba dicta de persona intelligi debent de conditione personæ: Words spoken of the person are to be understood of the condition of the person. 2 Rolle, 72.

Verba generalia generaliter sunt intelligenda: General words are to be generally understood. 3d Inst. 76. General words; how construed. Mallan: 373; White: 130.

Verba illata (relata) inesse videntur: Words referred to are to be considered as if incorporated. Bro. Max. 674-677; 263, 266. *Verba relata*.

Verba in differenti materia per prius, non per posterius, intelligenda sunt: Words referring to a different subject are to be interpreted by what goes before, not by what follows. Calvinus, Lex. *Ad ea quæ frequentius*, etc.; *Verba relata hoc maxime*, etc.

Verba intelligenda sunt in casu possibili: Words are to be understood in reference to a possible case. Calvinus, Lex. See REASON; IMPOSSIBILITY.

Jurisdiction does not attach to words or an illegal subject-matter. Weltmer: 268a; Beaumont: 367. *Fabula non judicium*.

VERBA FORTIUS ACCIPIUNTUR CONTRA PROFERENTEM: The words of an instrument are to be taken most strongly against the composer; or, every presumption is against a pleader. Bro. Max. 594-607; Co. Litt. 36a.

Max. No. 19: §§ 215-222; cited, pp. 14, 26; §§ 1, 8, 16, 18, 20, 22, 23, 29, 30, 38, 43, 48, 78, 79, 81, 155, 156, 204, 214a, 215, 216, 217, 218, 227, 228, 234, 236, 246, 269, Hughes' Proc.

Cited, §§ 13, 24, 26, 39, 60, 71, 76, 91, 99a, 102, 114, 118, 119, 124, 131, 144, 151, 164, 175, 200, 201, 206, 221, 236, 238, 262, 267, 268, 271, 276, 278, 286, Gr. & Rud. Vol. I.

A great canon, §§ 118, 144, 149, 164, 182, 223, 238, 297, 311 Gr. & Rud., Vol. I. Includes *De non apparentibus*. §§ 99a, 102, Gr. & Rud.; *Expressio unius*.

Indictments; abatement. It is a part of *Salus populi suprema lex*.

§ 1. It appears as one of Bacon's maxims, *id.*, 198-210. It comes from the Roman and Norman. It is well respected in

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English courts. *Dovaston v. Payne*: 217 illustrates its application in pleadings, also *Harvey v. Brydges*. In works on Procedure (Evidence, Pleading and Practice) it should be made prominent and be thoroughly impressed as a chief and first principle. See Preface, Datum Posts and Grounds and Rudiments, Vol. 1. It cannot be abolished in a constitutionalism. It is a leading principle of the prescriptive constitution. The above citations will illustrate its importance. See also THEORY OF THE CASE; VARIANCE.

§ 2. COGNATE MAXIMS AND CASES:

Ambiguum placitum interpretari debet contra proferentem: An ambiguous plea ought to be interpreted against the party pleading it. Bro. Max. 601; Sto. Pl. 665; 2 Sm. Lead. Cas. 1450, 8th ed.; notes to Rushton: 5.

Ambigua responsio contra proferentem est accipienda: An ambiguous answer is to be taken against the party who offers it. *Contra*: Halboner, 32 Colo. 51 (general denial favored over special. See Dickson: 34).

De non apparentibus et non existentibus eadem est ratio: A court will not take notice of nor assume a fact not juridically made to appear. Notes, Lampleigh: 301; 190 U. S. 546.

Quelibet concessio fortissime contra donatorem interpretanda est (*Roe v. Tranmarr*—ways of necessity).

In stipulationibus cum queritur quid actum sit verba contra stipulatorem interpretanda sunt.

In contrahenda venditione, ambiguum pactum contra venditorem interpretandum est. Frustra probatur quod probatum non relevat: It is vain and useless to prove what is not alleged.

Omnia presumuntur rite et solemniter esse acta: All acts are presumed to be rightly, regularly and validly done.

Verba aliquid operari debent; debent intelligi ut aliquid operentur.

Dovaston v. Payne: 217; *Harvey v. Brydges* (rules of res adjudicata).

Thomas v. Board (U. S.): 10a; *Moore v. C.*: 21; *R. v. Wheatley*: 19; *U. S. v. Cruikshank*: 232; *Huntsman*: 231; *R. v. Mills* (innocence presumed).

Hall v. Henderson (*Ambiguum placitum*, etc.).

McArthur v. Howett: 99; *Whitney v. Chicago R. R.*: 112; *Sturdivant v. Hull*: 410; *Crooker v. Holmes*: 110; *Roe v. Tranmarr* (contracts, notes, deeds); *Russell v. Shurtleff* (prayer); *Moynahan v. P.*; *Thornilly v. Prentice*; *Wiedbold v. Herman*: 98 (*idem sonans*; certainty of names required); *Dickson v. Cole*: 34: cases; *Seattle Bank v. Jones*: 36 (denials); *Harvey v. Brydges*.

All presumptions are against denials; what is not denied is admitted. To admissions is applied *Verba fortius accipiuntur*, etc.; *Falsus in uno, falsus in omnibus*.

Admissions upon the mandatory record are conclusive, irrefragable.

Ellis v. Colman (1858), 25 Beavan, 662, 53 Eng. Reprint, 790 (applies in equity); Sto. Pl. 10, 28, 37a, 665; *Lawrence v. McCalmont* (1844), 2 How. U. S. 426, 450, 11 L. ed. 335; *Amory Mfg. Co.* (1896), 89 Tex. 419, 59 Am. St. 69 (code); Gould, Pl. 141, 4 Encyc. Pl. & Pr. 759.

Herrin v. Brown, 44 Fla. 782, 103 Am. St. 182 (Code); Clem: 2c.

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§ 3. *Harvey v. Brydges*: Every presumption is against a pleader. Plaintiffs alleged that defendants *with force and arms* (*Taylor v. Cole*) broke in and upon certain realty, and expelled plaintiff therefrom. Plea that the realty belonged to defendants (*lib. ten.*). This being a good plea, plaintiff's allegations "*vi et armis*" being a mere formal allegation, that the defendants entered with some force sufficient to enable them to get into possession. From this allegation it will not be presumed defendants committed crime—a breach of the peace—and used unlawful force. *Dovaston*: 217 (*Verba fortius*).

§ 4. *The federal cases sustain this maxim, and agreeably to the above cases*. Averring one is a citizen before suit is brought is not an averment that he is such when the suit is brought; or when petition is filed to remove from state to federal court.

Craswell: 10; *Campbell*: 2; *Thomas v. Board*: 10a; See CONTINUITY; Beaumont: 367.

A warrant of commitment not stating that it is founded on a charge of crime will be presumed to be for misfortune. *P. v. Turner*: 252; *Van Cleef*: 17; *Cruikshank*: 232; *R. v. Mills*. See CONCLUSIONS OF LAW.

§ 5. Limitations of liberal construction.

Dobson: 232a; *R. v. Goldsmith*: 20 (common-law rule stated); S. P., Bro. Max. 601, 602, 8th ed.; *R. v. Solomons*; *R. v. Perrott*; *Bowman v. P.* See CERTAINTY; MAXIMS; §§ 3-12, Hughes' Proc.

See code sections, *sub* Maxims, and discussions of *Emerson v. Nash*, citing *Moore*, 16 Wis. 531, and stating the English and federal rule; *Miller v. Bayer* (1896), 94 Wis. 123 (*Ut res magis valeat quam pereat*, despite the meaning of historical allegations employed); *Ean v. R. R.* (1897), 95 Wis. 69: cases (strict rule of common law upheld); *Rushton*: 5 (statutory cause of action, like *Williams v. Hingham*: 7; and *Bartlett v. Crosier*: 6); *Kiesforth*, 98 Wis. 495 ("incompetent servant" is not "negligent servant"—strict rule); *Whitty*, 106 Wis. 87; *Rideout*; *Mallinckrodt*: 12a (Mo. Onus is on pleader throughout).

De Ruiter, 28 Ind. Ap. 9, 91 Am. St. 107; *Howard v. S.*: 166.

Dacey v. P. (1886), 116 Ill. 555, 6 Am. Cr. Rep. 46 (affidavit for continuance).

§ 6. *The rules of testing criminal pleadings are not more strict than those of civil. Frustra; Ignorantia; INDICTMENTS; CERTAINTY.*

1 Gr. Ev. 63, 65; 2 *id.* 7; 3 *id.* 10; *Cruikshank*: 232: cases. See *Res Adjudicata*, 196 U. S. 375, 395.

§ 7. *Certainty is essential in all systems maintaining the conserving principles of procedure.*

De non apparentibus, etc.; §§ 4-12, Hughes' Proc. See VARIANCE; DEPARTURES; WAITER; 196 U. S. 395.

§ 8. *Verba fortius* is closely related to the code provisions that the complaint must state a cause of action;

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that filing an answer will not waive that requirement. § 119, Gr. & Rud., Vol. I.; ABATEMENT; ARGUMENTATIVE; CODES. Also that fundamental requirement of all systems, that the general demurrer searches the entire record and attaches to the first fault, which objection may be raised upon motion in arrest and also upon collateral attack. §§ 201-261, Gr. & Rud., Vol. I. For the application of the above rules and tests the construction is always against the pleader, is always the same, and is always for the same great ends in a constitutionalism, namely, protection, by means of its conserving principles. §§ 118-119, Gr. & Rud. From this viewpoint this maxim appears as a prominent canon in an unwritten constitution. See ESTOPPEL; COLLATERAL ATTACK; §§ 118-119, 171-261, Gr. & Rud.

§ 9. *The code rules of construction were never intended to abrogate this maxim. It cannot be abolished in a constitutionalism.*

See RECORD; PROCEDURE; PLEADINGS; notes to *Lampieigh*: 301; WAIVER; PRESCRIPTIVE CONSTITUTION.

The claim that the code or statute has abolished it is unfounded and is not sustained by the decisions of courts that have not made of their jurisprudence a quagmire of dread and fear, of tricks and delusions, and of their official reports a monument of repulsive contradictions.

See *Cujus est instituire*, etc.; CERTAINTY; §§ 4-13, Hughes' Proc.

§ 10. *Every student should understand that both civil and criminal pleadings must be equally certain. There must be records and they must be certain in a constitutionalism. Statutes cannot derogate from requirements of higher laws. In presentia majoris. See CERTAINTY.*

§ 11. *Legislatures cannot prescribe for courts rules of construction. (See CODES.) Courts will protect and maintain government and its means of protection, and, for this end, the conserving principles of procedure. These are indispensable in a government of stability and protection. The states cannot prescribe rules of construction for federal courts. Kern v. Huidekoper. A power to direct construction is nothing less than sovereignty itself.*

Pp. 8-17, §§ 1-12, Hughes' Proc.; MAXIMS; LITERATURE; PROCEDURE; PLEADINGS; RECORD; WAIVER; CERTAINTY; STATUTES; End. Stat. 182; L.C. 214-232: cases; Russell v. Shurtleff.

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§ 12. *The common law adopted no greater principle from the civil law than the principal maxim. Constitutions reaffirmed it in America, both expressly and impliedly (Murray: 219: cases). Still, in some quarters it has been impaired and disparaged (Dovaston: 217). Its effacement and rescission carry with it much of the maxims De non apparentibus, etc., and Actore non probante reus absolvitur. Its abandonment is the advancement of the THEORY OF THE CASE and its cognate maxims, of which we elsewhere observe. The principal maxim should be correlated with all the essentials of procedure.*

§ 13. *Arguments and inferences will not supply allegations under any system, and never in the criminal or civil case, nor ever under a code. Questions relating to this are not questions of a statute, but of government and its limitations.*

Cruikshank: 232: cases; Thomas: 10a; Moore: 21; Bates: 225: cases; De non apparentibus. See *Res adjudicata*.

§ 14. *Consistent decisions in code states reaffirm Rushton, Bartlett and Van Leuven, L.C. 5-14. Cases that deny these decisions attack Verba fortius and its cognates—the essential matter for the foundation of a judgment and the conserving principles of procedure. They tolerate variances and departures; indeed they deny the essential means of a constitutionalism, which means often appear as an unwritten constitution. See CERTAINTY.*

§ 15. *Reasonable and natural construction of pleading will be given. Lockhardt v. Leeds (1904), 195 U. S. 427-438 (sufficient if they apprise a party).*

§ 16. *What is not alleged can not be proved.*

Harrison v. Nixon (Bill in equity); cited, 195 U. S. 133; Garland: 60. *Frustra probatur*, etc.; Wisconsin Land Co.; *Quod ab initio*, etc.; Sto. Pl. 10.

§ 17. *Relations of Verba fortius. The principal maxim often appears as a corollary of De non apparentibus; these in unison reflect Expressio unius, from many viewpoints. These maxims often appear as affines, while Consensus tollit errorem, Expressio eorum, Omnia præsumuntur rite appear as repulses. These cognates are ideas around which are extended and confusing discussions. These discussions involve and introduce the view that the code is a new and revolutionary system. These*

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discussions are referred to in Dovaston: 217. Many decisions may be cited to support that view, when a close investigation will show that the best considered code cases but reaffirm these maxims, and the cases that illustrate their application, e. g., *Rushton, Bartlett and Williams v. Hingham Turnpike Co.*, L. C. 5-7. Where code cases affirm these it is a historical mistake to say the code provisions have introduced a new rule. Contention for legislative power to reverse the rule in the principal maxim consistently with maintaining the conserving principles of procedure is a *reductio ad absurdum* when viewed from requirements of *Res adjudicata* and other conserving principles.

See *Res adjudicata*; CONSTRUCTIVE NOTICE; COLLATERAL ATTACK; MAXIMS; CERTAINTY; *Cruikshank*: 232; Kollock; Taylor v. Sprinkle; Bates: 225; Russell v. Shurtleff; Rensberger; RULES OF COURT; VARIANCE.

- § 18. *Attempts at partitioning the law; results.* Attempts to delimit equity jurisprudence and the other maxims of the civil law, and treat them as auxiliary, or merely incidental, instead of principal and fundamental, have left their ineffaceable marks upon the writings and teachings of the last fifty years. *Uno absurdo dato.*

"Truth crushed to earth will rise again,
The eternal years of gods are hers;
While error wounded writhes in pain,
And dies among her worshippers."

- § 19. *Inferior and statutory records are construed according to Verba fortius, etc.*

Walker v. Turner: 118; *White*: 130; *Kempe's Lessee v. Kennedy*: 115. See TAXATION.

Pleas in abatement are strictly judged. *Dacey v. P.*, *supra*; 2 Gr. Ev. 19; *Myers v. Erwin*: 150; *R. v. Gibson*: 149. See ABATEMENT.

Codes also sustain the maxim, as is shown by the Wisconsin and Indiana cases. See L. C. 1-21; PROCEDURE. Cf. 2 Thomp. Trl. §§ 2310, 2311; And. Steph. Pl. 230: cases, 2 ed.; Pom. Rem. 546; Ell. App. Proc. 717; 1 Ell. Ev. 143 (views of the old authors); Breeze; Rensberger; Hume: cases (*Denies Dovaston*: 217).

- § 20. *The conserving principles of procedure, enumerated, defined and elucidated in the introduction (Hughes' Proc.; §§ 83-123, Gr. & Rud.) depend upon an application of the strict rule expressed in this maxim.* See LITERATURE; MAXIMS (quoting and discussing the code provisions). These are limited by the requirements of dominating principles. These are stated in relation to collateral attack, *res adjudicata*, constructive notice, removal of causes, division of state power, election of remedies, and other high policies.

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- § 21. *In several states decisions are found sustaining the view that Verba fortius is only applied before trial.* Sargent, 215 Ill. 428; *Bowman v. P.*; *Harrow v. Grogan*. But see *Res adjudicata* rules; CERTAINTY.

Clem v. Meserole: 2c (a judgment depends upon its foundation, and this is presumed against until it is shown; an authority must appear).

Duvall v. Ellis (office certificates). See OBJECTIONS; EXCEPTIONS; BURDEN OF PROOF; ACTORE.

- § 22. *In contract law, language is taken most strongly against those for whose benefit it is.* May, Ins. 175; 2 Whart. Conts. 656, 670; *Royal Ins. Co. v. Martin* (1904), 192 U. S. 149: cases. *In deeds, words of conveyance will prevail over repugnant restrictions.* Wilkins v. Norman. See *Barnard v. Cushing*: 108.

- § 23. *Self-preservation makes men careful not to prejudice their own interests by a too extensive meaning of words.* The maxim tends to prevent deception, else some would affect ambiguous and intricate expressions, if at liberty afterwards to put their own construction upon them. Contracts, when ambiguous, are construed against the composer. *Nullus commodum.* *Wyatt*, 18 Colo. 298, 36 Am. St. 280, n. 2; Dev. Deeds, 848, 1 Beach, Conts. 718, 726, 742. *Ut res magis.*

- § 24. *Every presumption is against a carrier's ticket.* Ind. St. Ry. v. *Wilson* (1903), 161 Ind. 153, 100 Am. St. 261-287; *Quelbet concessio*, etc.; *Cherry v. C. & A. R. R.*; 102 Am. St. 68-71.

- § 25. *One making commercial paper and deeds is presumed to intend to make them operative. Ambiguities will be construed away if possible.* See AMBIGUITY; Wilkins v. Norman (Deeds); Crooker v. Holmes (commercial paper).

If one drew a check and wrote it this way: "\$3.50, Three Dollars" this would be a patent ambiguity; it fails to express the required intent or assent; it is not certain. The last words do not prevail, nor do they limit the figures. But if the figures were in the margin they would be treated as surplusage (*Utile*); but being in the body of the instrument they must be considered. Such a repugnancy destroys the instrument. § 53 (Convenience), Gr. & Rud. Contracts must be certain. Kelley: 304.

- § 26. *One is presumed to state his case in the best possible light.* *Hanford v. Davis*: 86: cases; 190 U. S. 540-546; *Atlantic Co. v. Benedict Co.* (rule ably stated and cites *Dovaston*: 217); *Chicago v. P.* (1905), 215 Ill. 235; *Mallinckrodt*: 12a (Mo.).

Harvey v. Brydges. See Title H. Cited §§ 174, 199, 278, Gr. & Rud.

- § 27. *Courts will not assume facts not juridically made to appear; if not alleged they are presumed not to exist.* *Doremus v. Root* (1899), 94 Fed. 760. See ALLEGATIONS.

- § 28. *Abstracts of record are judged by this rule.* *Vandeventer v. Goss* (Mo.). Courts will not assume facts and proceed upon such assumptions. See ASSIGNMENT OF ERRORS; Atlantic.

- § 29. *Indictment for rape must charge it was against the will, otherwise the act will be presumed to have been by consent.* *S. v. Marsh* (1903), 134 N. C. 184, 67 L. R. A. 179-195, ext. n. *Verba fortius* is of superior dignity.

Verba Fortius.—

§ 30. Word "owner" does not necessarily mean an inheritable estate. For the latter that word will not do. *Davenport v. Farrar* (Ill. Ambiguous words).

§ 31. *Presumption of regularity yields to Verba fortius—e. g.*, where a juridical document is pleaded it must be averred that it was made and entered of record and still remains of record, as by reference thereto will more fully appear.

§ 32. *Buck v. Colbath*: Buck was sued for illegally seizing goods. He justified upon the sole ground he was a U. S. marshal. He did not aver the goods belonged to the defendant named in his writ; consequently he did not show a federal question was involved and therefore no writ of error could issue to the state court. *Buck v. Colbath*, stated, 139 U. S. 631.

VERBA GENERALIA RESTRINGUNTUR ad habilitatem rei vel personæ: General words must be confined or restrained to the nature of the subject or aptitude of the person; or to the persons to whom they relate. Bro. Max. 646-650; Bac. Max. Reg. 1; Suth. Stat. 268-281; 2 Whart. Conts. 667, 669; 4 Encyc. Pl. & Prac. 742-755; Burks v. Bosso: 217a. *Max. No. 25*, §§ 268-275, 16, 42, 65, 189, 201, 234, 262, 268, 272-275, Hughes' Proc.; §§ 61, 164, 182, Gr. & Rud.

COGNATE MAXIMS AND CASES:

Expressio unius est exclusio alterius; *Verba accipienda ut sortientur effectum*; *Verba in differenti materia per prius, non per posterius, intelligenda sunt*; *Verba generalia restringuntur ad habilitatem rei vel aptitudinem personæ*.

Bristow v. Wright: 135 (descriptive matter must be proved as laid).

Eddy Co. v. Blackburn: 136; *Wabash R. R. v. Friedman*: 137 (S. P. as *Bristow*: 135); *Perry v. Porter*: 136a (S. P. *Bristow*).

Martin v. Hunter's Lessee: 246; *McCulloch*: 147 (things implied need not be mentioned).

Cohens: 244; *Houston*: 245; *Windsor*: 1 (a court is bound and limited by its record).

Dickson: 34 (all of an answer will be looked to, and admissions in it will override denials. General denials will not override special admissions).

White v. Lyons: 140 (a statement in a pleading is not limited by the prayer).

Rossiter v. Rossiter (general expressions in a power of attorney are limited by particulars; particulars control universals).

Cardenas v. Miller (1895), 108 Cal. 250, 49 Am. St. 84 (particular words in a statute control general; general words are limited by subject-matter).

The principal maxim is one of the most useful in construction. *Bristow*: 135; *Ward v. Sherman*, 192 U. S. 168; *Chitty v. R. R. (Mo.)*. It may well be classed with the basic principles of the prescriptive constitution.

Applies to equity pleading. Sto. Pl. 28, n., 10 ed.; Colman, sub *Dovaston*: 217.

A general denial followed by a particular statement of fact admitting the fact overrides the denial. *Dickson*: 34. Applies to admissions and denials. *Seattle*: 36; *Dickson*: 34. Is a part of *Expressio unius*, etc., and is illustrated in *Bristow*: 135. *Specific statements limit and control general denials*. *Dickson*: 34.

A special statute controls a general. S. ex rel, *Douglas Co.*, 53 Neb. 556, 39 L. R.

Verba Generalia.—

A. 513; *Generalia specialibus non derogant*.

A special provision controls a general. C. v. *People's Bank*, 5 Allen, 428; *Felt*, 19 Wis. 208; *Sedgk. Stat.* 98, 99.

Deeds; general description followed by a clause summing up the intention of the parties as to the premises conveyed. Such a clause has a controlling effect upon all prior phrases used in the description. *Plummer*, 92 Mich. 1, 31 Am. St. 567, n.; *Peaslee*, 60 Vt. 188, 6 Am. St. 103 (will); *Reynolds*, 59 Ark. 299, 43 Am. St. 36 (deed), *Sedgk. & Walt*, Tri. Tit. 58; *Gano*, 27 Ind. 294; *Moore*, 22 Me. 360; *Heaton v. Hodges*; *Wilkin*.

Pleadings. *Verba generalia applies to*. Pleadings are to limit issues and to narrow proofs. *Bliss*, Pl. 138.

Courts will determine and declare issues. *Gay*: 138; *Kollock*. Where, in no aspect of the case, consistently with good faith, a denial can exist with admissions made upon the record, the court will hold the denials overcome by admissions. *Dickson*: 34; *Crater*; *Sto. Pl.* 37a; *Suth. Stat.* 268.

Specific allegations are not enlarged by conclusions of law. *Blaisdell Co.*, 96 Tex. 626, 97 Am. St. 944. See *Horne*; *Harvey v. Brydges*.

General denials followed by specific, the latter control. *Delano*, 96 Cal. 275, 31 Am. St. 201. Admissions in pleadings control and qualify throughout. *Crater*; 4 Encyc. Pl. & Pr. 755, 746, 747.

General allegations are controlled and limited by following specific allegations; as where one avers that he is owner, and then pleads his title specifically, the latter controls and excludes all other titles. *Expressio unius*, etc.; *Castro v. Richardson* (1861), 18 Cal. 478; *Eagan v. Delaney* (1860), 16 Cal. 85; *Lane v. Schlemmer* (1887), 114 Ind. 296, 5 Am. St. 621. One is presumed careful of the language that he employs. *Chitty v. R. R. (Mo.)*; *Verba fortius*, etc.

It is held that a general denial in replevin admits in proof all defenses; a special plea will not restrict a general denial. *Horney*, 53 Neb. 522, 68 Am. St. 623. Also justification plea in defamation. See **DEFAMATION**.

Captions in pleadings are controlled by allegations in the statement. 4 Encyc. Pl. & Pr. 598. The title of pleadings, captions. 4 Encyc. Pl. & Pr. 589-600.

Judicial decisions and dicta are always construed from the record submitted conferring jurisdiction upon a court. *Cohens*: 244; *East Tenn. R. R.*, 89 Tenn. 311; *Sanders*, 4 Pickle, 355; *Munday*: 79; *Windsor*: 1.

As a precedent it is limited to those points of law which are raised by the record, that are considered by the court, and that are necessary for the determination of the case. *Wright*, 101 U. S. 791, 797; *Black*, Int. Stat. 361; *Woodruff v. Parham*; *Cohens*: 244; *Mutual Ins.*, 6 Wheat. 606. For *res adjudicata* purposes the same rationale obtains. The court that looks to opinions, to dicta, for what must appear from the mandatory record, commits a great breach of the law, is guilty of gross inconsistency, of rank absurdity; for it holds that pleadings can be waived or abandoned.

The language of judicial decisions is always to be construed with reference to the circumstances. *Contemporanea expositio*, etc., or the particular case and the question under consideration and the

Verba Generalia.—

authority of the decision. See Cohens: 244; East Tenn., *supra*; Sanders, *supra*; *Modica circumstantia*, etc. Every word, every part of the entire record is sought and given effect to if possible. Oelbermann, 93 Wis. 669, 57 Am. St. 947, n.; *Ut res magis*, etc.

A verdict is limited by the evidence and is construed in the light thereof on appeal. Citizens' Bank, 180 N. Y. 346, 105 Am. St. 765.

The record stands as do words of enumeration, of limitation, as to particular words, and always and in all relations these control. *Ut res magis valeat quam pereat*. Otherwise the pleadings would be surplusage and requirements for these and for bills of exceptions would be useless, would be vain and fruitless. *Lex neminem cogit*, etc. An absurdity would result. The pleadings must control, else a "court of appellate jurisdiction only" falls. Marbury: 142. Otherwise there could not be that dual or triplicate consideration of a cause as constitutions provide for and contemplate. And where the mandatory record is sufficient to support a judgment, then there is nothing that can be considered except what appears in a bill of exceptions. Insurance Co.: 157. No proposition of the law is overruled which was not in the mind of the court when the decision was made. Woodruff v. Parham; Wong Kim Ark v. U. S., *sub* Cohens: 244. And nothing was before the court which did not arise according to constitution and laws.

S. v. Baughman: 268; Windsor: 1 (*see* Breeze v. Haley); Black, Int. Stat. 391-400, Cool. Const. Lim. 58, n.

When, after an enumeration of particulars, there is a sweeping clause, comprising all other things under a general description, the scope of such clause is restricted in such things within the description of the same kind with the particulars enumerated.

Rooke v. Lord Kensington (1856), 25 L. J. Ch. 795-801, 2 H. & J. 752, 14 Rul. Cas. 717; Grumley v. Webb (1869), 44 Mo. 444, 457; St. Louis v. Laughlin (1872), 49 Mo. 559, Bro. Max. 649, 651.

"All household and personal effects" are controlled by a subsequent and specific description in a chattel mortgage. Kearney v. Clutton (1894), 101 Mich. 106, 45 Am. St. 394. Power to correct clerical errors as a matter of form in a statute is not enlarged by general words. Matter of Hermance (1877), 71 N. Y. 481-487: cases (tax case). General words may be limited by what precedes or follows. *Ejusdem generis*. Smyth v. Lynch (1896), 7 Colo. App. 383, 387; Billings v. Morrow, 7 Cal. 171. And likewise denials in pleadings. Dickson v. Cole. Reserving the right of minerals; with certain liberties the latter are limited to means of ingress and egress to get the minerals only, nothing else. Durham R. R. v. Walker (1842), 2 Q. B. 940, 2 Gale & Dav. 326, 17 Rul. Cas. 599.

Generalibus specialia derogant. General words do not derogate from special. 1 Rep. & Law Dic. 567; Richards v. Com-

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m'rs of Clay County (1894), 40 Neb. 45, 42 Am. St. 650-661, ext. n. (statutory remedy for collecting a tax is exclusive. See TAXATION); End. Stat. 223-233.

A special provision prevails over a general one. Sedgk. Stat. & Const. Law, 98, 99; 1 Dill. Munic. Corp., 54, n.; S. v. Getze (1867), 22 Wis. 348. *In re* Goddard (1836), 16 Pick. 504; Crosby v. Patch (1861), 18 Cal. 438; S. v. Mills (1870), 34 N. J. Law, 177, Bish. Stat. Crimes, 156.

Words are restrained by subject-matter. Jones, Construc. 220. See SUBJECT-MATTER. Associated words are enlarged, restrained, expanded or contracted. End. Stat. 390-415, Bish. Stat. Crimes, 345. Every word must be given effect to, and this strengthens an enumeration and particular words. *Ut res magis*, etc.; *Noscitur a sociis*; *Falsa demonstratio*.

Preambles affect what follows. Suth. Stat. 212-213, 247; and the title of an act. *Id.* 211. Amendments of the constitution limit and control what precedes. General and special provisions. McClain, C. L. 89, 90. General clause; particular enumeration. *Id.* 90.

Nomen generalissimum is to be largely construed. 2 Whart. Ev. 640. But particulars limit universals. *Id.*

Verba generalia is instructively applied in cases where general averments of negligence are followed by specific charges in the statement. This is a general rule; it is a rule of logic and is founded in strong sense and from the necessity of giving to each word employed a meaning. Such a rule has all the footing of organic law and therefore may be considered a part of the unwritten constitution. An ordinance however high, overthrowing this rule, would no doubt meet the disapproval of those courts that construe laws to harmonize with laws. *Concordare leges legibus est optimus interpretandi modus*. Absurdity is excluded by construction. The means of the due administration of the laws, of the conserving principles of procedure, are vindicated by the courts.

The foregoing rule is accentuated in negligence cases, but it applies to all cases alike. Chitty v. Iron Mt. R. R. (1898), 148 Mo. 64, 75: cases (negligence); McMenamie v. R. R. (1876), 135 Mo. 440, 447; Waldhier v. R. R. (1880), 71 Mo. 514 (*Noscitur a sociis*); McCarty v. Hotel Co. (1898), 144 Mo. 397, 402: cases (*Noscitur a sociis*).

VERBA INTENTIONE DEBENT IN-

servire: Words are to be governed by the intention. 1 Bl. Com. 61, 2 *id.* 379, 1 Kent. 366, 462, 2 *id.* 555, Suth. Stat. 268, 428, 429, 1 Chit. Conts. 104; 3 Page, Conts. 1126; 8 Cyc. 736-734.

Cited, p. 33; §§ 7-9, 12, 13, 19, 28, 29, 32, 41, 43, 102, 156, 166, 169a, 172, 180, 189, 199, 204, 206, 209, 256, 263, 286, 292, 296, 297, 352, Hughes' Proc.; §§ 34, 74-79, 134, 150-152, 160, 175, 201, 224, 267, 305, Gr. & Rud.

COGNATE MAXIMS AND CASES:

Concordare leges legibus est optimus interpretandi modus; Ut res magis valeat quam pereat; Lex non exakte definit, sed arbitrio boni viri permittit; Uno absurdo dato, infinita sequuntur; Ad ea quæ frequentius accidunt jura adaptantur (Williams, Ill.; Osgood, Vt.); *Quæ communi legi derogant stricte interpretantur; Ex-*

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pressio eorum quæ tacite insunt nihil operatur; Ita lex scripta est; Nimia subtilitas in jure reprobat, et talis certitudo certitudinem confundit (too great subtlety is disapproved of in law; for such nice pretence of certainty confounds true and legal certainty).

Harper v. City Ins. Co.: 218 (express words yield to intention). See also *Oakley*: 222; *O'Connell*: 224; *Bates*: 225; *S. v. Bolden*: 216 (fundamental principles are interpreted into statutes); *Kirby v. U. S.*; *Osgood v. R. R.*; *S. v. Kelly* (Kans.); *S. v. Sheppard* (Mo.); *Burks v. Bosso*: 217a; *Ellis v. U. S.*

C. v. Hess: 215 (the common law annexes itself to all compacts—contracts—statutes and constitutions). *Dyson v. Rhode Island Co.* (1904), 25 R. I. 600, 65 L. R. A. 238. (S. P., *C. v. Hess*: 215.) The prior law is "the very lock and key to open the window of the statute." 2 *Coke*, Inst. 308.

Work v. State: 242 (the word jury means a common-law jury).

Hawaii v. Mankichi (the broad language of the constitution does not include the people of a conquered territory). *Howe's Civil Law*.

Schick v. U. S. (the right to jury trial may be waived in misdemeanors), quoted *infra*: cases.

S. ex rel. Henson v. Sheppard (constitutions and statutes yield to higher and to moral laws).

Church of The Holy Trinity v. U. S. (statutes yield to higher and to moral laws).

Dick v. U. S., 208 U. S. 340 (*Concordare*).

Barry v. Truax (1904), 13 N. D. 131, 65 L. R. A. 762 (right to trial by jury includes common law essentials).

Murray v. Hoboken Land Co.: 219 (the constitution of the United States is construed in the light of and agreeably to *Magna Charta*); *Work*: 242; *C. v. Hess*: 215; *Schick v. U. S.* (quoted *infra*).

Barron v. Baltimore: 241 (the first ten amendments to the constitution of the United States do not apply to the states).

Kemble v. Farren: 391 (contract for stipulated damages may be construed a penalty).

Howard v. Harris (once a mortgage always a mortgage).

Burks v. Bosso: 217a (the intention of the lawmaker is sought and controls).

Bitty v. U. S., 208 U. S. 393 (*Ejusdem generis*).

Men are presumed sane and reasonable, to intend the natural, direct and probable consequences of their acts, that these shall not be absurdly or unreasonably construed, and therefore that they intend to avoid absurdities and nonsense. See *ABSURDITY*; *Squib Case*; 1 Gr. Ev. 18.

To illustrate, if one sells land entirely surrounded by his own, it is conclusively presumed that he intended that the grantee should have a private right of way over the surrounding land. (*Pinnington*.) It would be absurd to conclude otherwise.

Deeds are to be construed according to the intention of the parties. *Abercrombie*, 71 Kans. 538, 114 Am. St. 509.

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Things implied are to be added; surplusage is to be avoided. Intention is sought and controls. Bro. Max. 591; *Suth. Stat.* 334-344. For this, words may be disregarded. *Verba*, etc.; *Verba nihil operari*, etc.; *Verba offendi possunt*, etc.; *Quæ ad unum*, etc.; *Russell v. Shurtleff*; *C. v. Hess*: 215; *Iglehart*, 204 U. S. 478.

The common law is the perfection of reason and the bulwark of all our rights and liberties. Consequently, the rule is to annex it whenever and wherever possible. Upon this idea is a leading rule in construing a statute or indeed any collocation of words in contract, statute or constitution. *C. v. Hess*: 215; *Quæ communi legi derogant strictè interpretantur*.

Legislative acts will be construed for intelligence, patriotism, conservation and harmony. Concordare leges legibus, etc.; *End. Stat.* 182; *Indianapolis*: 223; *Weitmer*: 268a. *Ut res magis valeat quam pereat*.

A covered wagon is a house. *Sub Harper v. Ins. Co.*: 218; *Ad ea quæ frequentius*, etc. A boat is not a house. *P. v. Bernard* (1901), 125 Mich. 550, 65 L. R. A. 559. A bicyclist is not a passenger on the highway under a statute passed before there was such travel. *Bland v. P.* See *POLICE POWER*. *Fox v. Clarke* (1903), 25 R. I. 515, 65 L. R. A. 234. *Potior et potentior est dispositio legis quam hominis*: The law sometimes overrides the will of the individual and renders ineffective and futile his expressed intention or contract. Bro. Max. 697, 698. *Kemble*: 391; *Ellis*: 389; *Union Trust Co. v. Preston*; *Osgood v. R. R.* Contracts are construed as contemplated. *St. Louis Beef Co.*; *Harper*: 218.

Contracts for fraud or gross negligence will be disregarded. *Hollister*: 354; *R. R. v. Fraloff*: 355.

"Act and operation of law" is independent of intent. *Lyon v. Reed*; Bro. Max. 698.

Time is not the essence of a contract. *Seaton*.

Intent of legislature is sought. *Williams v. Chicago R. R.*, 196 U. S. 1, 207, 327; *Church v. U. S.*

Words, how construed. See *Verba*, etc.; *In testamentis*, etc.; Bro. Max. 555.

Late decisions of the supreme court of the United States involve *Verba intentione*, etc., relating to the status of the citizens of conquered territory. A bare majority of the court holds that the guaranty of jury trial in the federal constitution does not extend to citizens of conquered territory. Of course it is otherwise if tried in other territory. The minority of the court offers extended and strenuous dissenting opinions, holding *inter alia* that at earlier epochs it would have been held that the clear, express words admit of no exception. *Contemporanea expositio*, etc. See *PHILIPPINE ISLANDS*: cases.

Verba Intentione.—

In states where the statutory record is substituted for the mandatory record, and the former is so made the foundation of a judgment, the principal maxim is disregarded for the reason that the statutory record was never designed or intended for that purpose. *Cujus est instituere*, etc. See MAXIMS; LITERATURE; RECORD.

Framers of constitutions are presumed to have adopted the meaning of words as defined by the common law. We quote:

"It must be read in the light of the common law. 'That,' said Mr. Justice Bradley, in *Moore v. U. S.*, 91 U. S. 270, 274, referring to the common law, 'is the system from which our judicial ideas and legal definitions are derived. The language of the constitution and of many acts of congress could not be understood without reference to the common law.' Again, in *Smith v. Alabama*, 124 U. S. 465, 478, is this declaration by Mr. Justice Matthews:

"The interpretation of the constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law and are to be read in the light of its history." In *U. S. v. Wong Kim Ark*, 169 U. S. 649, 654, Mr. Justice Gray used this language:

"In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the constitution." *Minor v. Happersett*, 21 Wall. 162; *Ex parte Wilson*, 114 U. S. 417, 422; *Boyle v. U. S.*, 116 U. S. 616, 624, 625; *Smith v. Alabama*, 123 U. S. 465. See also *Kepner v. U. S.*, post 100; 1 Kent, 336; *South Carolina v. U. S.*; *Church v. U. S.*; 8 Cyc. 730.

"Blackstone's commentaries" are accepted as the most satisfactory exposition of the common law of England. At the time of the adoption of the federal constitution it had been published about twenty years, and it has been said that more copies of the work had been sold in this country than in England, so that undoubtedly the framers of the constitution were familiar with it. In his treatise, vol. 4, p. 5, is given a definition of the word 'crimes.' *Schick v. U. S.* (1904), 195 U. S. 65, ante ('all criminal offenses' has a broader meaning than 'all crimes')."

"A thing may be within the letter of a statute and not within its meaning, and within its meaning though not within its letter." Haddock; Burks: 217a.

S. v. Bolden: 216; *Hawaii*; *P. v. Utica Ins. Co.*, 15 Johns. 358, 381; *U. S. v. Kirby*: stated, *S. v. Bolden*, 190 U. S. 213; *Carlisle v. U. S.* (1872), 16 Wall. 147, 253; *Atkins*, 18 Wall. 272; *In re Louisville Underwriters* (1890), 134 U. S. 488, 33 L. ed. 991, 10 Sup. Ct. Rep. 587; *Heydenfeldt v. Daney*, etc. Co. (1876), 93 U. S. 634, 638, 23 L. ed. 995; *Church v. U. S.*; *Smythe*, 23 Wall. 374, 380, citing *Heydon's Case*; *Lau*, 144 U. S. 47, 59; *Plumstead*, L. R. 13 Q. B.

Verba Intentione.—

Div. 878, 887: stated, 190 U. S. 214, 13 Mews' E. C. L.; *Walton*, *Ex parte* (1881), L. R. 17 Ch. Div. 746. See *Indianapolis*: 223.

In construing a contract, the court cannot, in order to prevent a forfeiture, go farther than a fair construction of the language used will permit. *Expressio unius*, etc. *Ut res magis valeat quam pereat* has limitations, q. v.

Parties cannot make a non-assignable agreement. 3 Page, Conts. 1263; *Bewick*, 94 Ga. 531. *Contra*, *Mueller*.

Courts cannot make contracts for parties. An assured person must pay his premiums or stand the consequent forfeitures, exactly as the policy provides; and such forfeiture is self-executing, if so provided, without further notice, declaration or demand. *Behling*, 117 Wis. 24.

Absurdities must be avoided. See *Id.* Intention overrides the letter. *Harper*: cases; *Kemble*: cases; *Howard v. Harris* (an absolute deed may be construed a mortgage. *Cujus est instituere*, etc.). *Weltmer*.

A federal statute provided that a contract without a stamp should be void in all courts; but this was held to apply to federal courts only. *Garland*: 40; 2 Page, Conts. 576; *Small v. Slocumb*, 112 Ga. 279, 81 Am. St. 50, 53, 53 L. R. A. 130; *Osgood v. R. R.*

Singing birds held not to be live animals. *Relche v. Smythe* (1871), 13 Wall. (U. S.) 162. *Suth. Stat.* 218, 242, 268. *Church*. "A single man" held not to include a "married man." *Silver*, 7 Wall. 219; *Suth. Stat.* 218, 417.

An endorsement "without recourse" nevertheless warrants genuineness of signatures, and that the paper is not paid—that a judgment may be obtained. *Caveat*.

A statute providing that, in an action on a sealed instrument, "the seal thereof shall be only presumptive evidence of a consideration, which may be rebutted," was construed away in an action upon a note under seal. *Aller*, 40 N. J. Law, 446, *Ans. Conts.* 49, n. See also *Bates v. Bulkley*: 225.

A county is liable by implication for attorney's fee for prosecuting disbarment case, under the court's appointment. *Hyatt*, 121 Iowa, 292, 100 Am. St. 354, n.: *contra* cases.

Obvious mistake may be corrected by context. *Whart.* Conts. 210.

Supposed intent not to be introduced to override words. 2 *Whart.* Conts. 658.

Ice stored in ice-house passes by a deed to the realty. *Elwes*: cases. See *Verba*, etc.

Civil code; construction of. *McClain*, C. L. 88. See MAXIMS; CODE; *Lead. Cas.* 214-232. Requirement for process to be signed is satisfied by a stencil signing. *Brown*: 346.

VERBA ITA SUNT INTELLIGENDA, ut res magis valeat quam pereat: Words are to be so understood, that the subject-matter may be preserved rather than destroyed. *Bacon*, *Max. Reg.* 3; *Plowd.* 156; 2 Kent, 555. *Verba generalia*, etc. Subject-matter must be protected. *Russell v. Shurtleff*.

VERBA NIHIL OPERARI MELIUS est quam absurde: It is better that words should have no operation than to operate absurdly. Calvinus, *Lex*. Cited, § 149, Hughes' *Conts.* §§ 28, 167, Hughes' *Proc.*

Absurdity is to be excluded. See *Verba offendi*, etc.; **ABSURDITY**; **SUBJECT-MATTER**. *E. g.*, a statute may provide that upon filing a complaint a summons shall issue; but suppose a defendant appeared and waived a summons, then still must a summons issue, because the "statute says so"? See *White*: 130; *Bates*: 225; also *Russell v. Shurtleff*. Again, suppose that an amendment is made to a code of civil procedure and to be gathered under its restricted title (*Bobel*: 250; *Nigrum*, etc.), allowing persons accused of contempt a jury trial; now, should not this equally apply to all contempts? Or, would it be sound construction to hold that such an act applied only to contempts arising from civil causes? Is not a contemptuous publication exactly the same whether the court was proceeding with a civil or a criminal cause? Impeding a court in the discharge of its duties is always and in all cases an offense, and it is an absurd construction to hold that there is, nevertheless, a distinction, and that this depends on construction arising from the title of an act. See **ABSURDITY**; *End. Stat.* 182; *O'Connell*: 224. If a statute provides that a jury may allow exemplary damages, and a jury is waived, of course the judge may allow such damages. *Cessante ratione legis*, etc.; *Concordare leges legibus est optimus interpretandi modus*; "The spirit maketh, but the letter killeth the law"; *Lex non exacte*.

Upon collateral attack a wide range of objections may be made to records and of course to pleadings; then objections *ore tenus* may be made; then the basis of objection is that usurpation is shown by the record or other abuse of power or gross neglect of duty.

Now, may a legislature prescribe for courts that such objections may not be made in the same way, at the beginning and at all stages? Would it not be absurd to hamper, obstruct and limit objections at the beginning, but aid and facilitate the same objections at a last stage, as upon collateral attack?

Those statutes that provide that all grounds of the general demurrer must be in writing and aptly filed have to be construed into a system of law that has and protects motions in arrest of judgment and collateral attack, and in which absurdities are excluded and laws are made to harmonize. *Concordare leges legibus est*, etc.; *Russell v. Shurtleff*. See **MAXIMS**; **VARIANCE**; **POLICE POWER**.

VERBA OFFENDI POSSUNT, IMO ab eis recedere licet, ut verba ad sanum intellectum reducantur: You may disagree with words, nay, you may recede from them, in order that they may be reduced to a sensible meaning. Calvinus, *Lex*. Reason controls meaning of words; and absurdities must be excluded. See *Verba nihil*, etc.; *End. Stat.* 182; *Concordare*, etc. Cited, § 149, Hughes, *Conts.*

VERBA RELATA HOC MAXIME operantur per referentiam ut in eis inesse

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videntur: Words to which reference is made in an instrument have the same effect and operation as if they were inserted in the clause referring to them. *Bro. Max.* 673-679; *Smith, Conts.* 554; *Suth. Stat.* 257, 390; *Cohens*: 244; *Galpin*; *S. v. Moore*: 222a; *R. v. Waters*: 71; *And. Dic.*: *Shillaber* (1887), 74 *Cal.* 144, 5 *Am. St.* 433, n. (will incorporate by reference); *Conner*, 65 *C. C. A.* 106, 130 *Fed. 473*, 7 *L. R. A.* 106 (ignorance of document referred to no defence); *Bryan*, 77 *Conn.* 604, 107 *Am. St.* 64-75, *ext. n.*

Max. No. 26: §§ 276-285; cited, §§ 237, 249, 276, 277, 280, 281, 283, 284, 285, Hughes' *Proc.*; §§ 116, 164, 213, Gr. & Rud.

One count may incorporate another by reference. *R. v. Waverton*: 70. To avoid prolixity one count may incorporate another. *Blitz*; *Consolidated Coal*, 163 *Ill.* 393; *Ramsey*, 8 *Wyo.* 476, 80 *Am. St.* 948, 952, citing *Haskel*: 101.

The objection to this practice is the inconvenience of turning, and also from consequences of striking out the part incorporated by reference. See **CONSTRUCTIVE NOTICE**.

Pleadings incorporated by reference in constitutions as a constitutional implication. *Davis*, 179 *U. S.* 399 (constitution providing for prosecution by information, by implication annexes the law of that pleading).

Skeleton bills of exceptions incorporate by reference. *Hand*, 167 *Ill.* 402; *Winters*, 102 *Iowa*, 53, 63 *Am. St.* 428; *Garrick*, 94 *Ill.* 588. *Court files may be so incorporated.* *Sutherland*, 102 *Iowa*, 535, 63 *Am. St.* 477, n.

Exhibits may be made a part of a pleading if made consistently with the certainty required for due process of law, appellate procedure, *res adjudicata*, removal of causes and the functions of a demurrer. 8 *Encyc. Pl. & Pr.* 736-743. They must be set forth:

1. *In hæc verba* in forgery, perjury, conspiracy, *res adjudicata* and justification pleas. *J'Anson*: 91. See *Res adjudicata*; *Dewey*, 60 *Vt.* 1, 6 *Am. St.* 84, n. (*res adjudicata* pleas may incorporate a plea by reference to avoid prolixity).
2. *In substance, by legal effect.* 2 *Gr. Ev.* 14, 6 *Encyc. Pl. & Pr.* 263, *Boone*, Code 1, 27; *McC Campbell*, 10 *Iowa*, 538; *Crawford*, 27 *O. St.* 421. The substance of documents shall generally be set forth in bills of exceptions. See *Id.*; *R. R. v. Stewart* (*U. S.*); 3 *Encyc. Pl. & Pr.* 435; *Sto. Pl.* 240, 266; 9 *Cyc.* 713.
3. *By reference*, as it is made in contracts, as above noted.

Exhibits, if made a part of a pleading, must be set forth in it in hæc verba, or in substance. *Murdock*, 38 *Cal.* 596-603. Exhibits attached to a bill insufficient. *Buck*, 2 *Colo.* 182; 6 *Colo.* 223; *Caspary*, 19 *Or.* 496, 20 *Am. St.* 842; *Morrison*, 7 *Or.* 472, 6 *Encyc. Pl. & Pr.* 299, 8 *id.* 740. It is held demurrable to plead an instrument sued on in hæc verba. *Estes*, 155 *Mo.* 577, 583 (theory of the case must be set forth).

A certain and definite incorporation is necessary in those states that have not abrogated the *mandatory record*, so that a respondent may intelligibly plead and demur, and that one may not have to demur to loose exhibits, which are not made a part of the pleading itself with certainty. A demurrer will lie to facts presented by an exhibit, when it is adopted and made

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part of the pleading. *Fuqua*, 90 Tex. 298, 35 L. R. A. 241. A document should at least be set forth in substance in the bill, and to this a copy may be annexed for reference. 3 Encyc. Pl. & Pr. 362, 6 *id.* 253, 299.

Judgments may be aided by court files. Bank, 109 Mich. 515, 63 Am. St. 597, n. See *Montgomery*: 47; *Clem*: 2c; *Uires magis valeat quam pereat*.

One judgment may refer to and include another. 1 Freem. Judgt. 54. And it is held that judgments may include parties, etc., by reference. First Nat'l Bk., 109 Mich. 515, 33 L. R. A. 83; cases. Decrees may embrace pleading, etc., by reference, and according to *Certum est quod*, etc., 5 Encyc. Pl. & Pr. 1067. And a decree may incorporate a description in a recorded deed. *Thain*, 126 Ind. 272. An affidavit in attachment may incorporate by reference. *Beebe*, 76 Mich. 114, 15 Am. St. 288-298, ext. n.

An affidavit for an order of publication cannot be aided by reference to the complaint, etc. (*Ricketson*: 59); and the reason of this is found in the rationale of constructive notice. But in *Cooper v. Reynolds*, superfluous recitals in a degree aided omissions in that part of the record that the clerk should have made. Elsewhere we observe of that case. Subsequent pleadings cannot aid antecedent. *Divine*.

Statutes incorporate by reference, as where it is provided that the practice in cases at law in United States courts shall be the same as the state practice where the court is sitting. New courts in Porto Rico shall have powers of other courts. *Perez*: 2c. See *FEDERAL PROCEDURE*.

Deeds; one may incorporate another by reference. *Hines v. Robinson*; *Newman v. Tymeson* (1860), 13 Wis. 172, 80 Am. Dec. 735, n.

A map may be incorporated by reference. *Heaton v. Hodges*; *Lewis v. Portland* (1893), 25 Or. 133, 42 Am. St. 772, n., 1 Beach, Eq. 357. Map; when controlling in the description of a deed. *Kenyon v. Knipe* (1891), 2 Wash. 394, 13 L. R. A. 142, n.

Notice of equities and of unrecorded deeds charge one with equities. *Le Neve*: 396; *Williamson v. Brown*. Municipal bonds referring to a statute incorporate it. *Ogden v. Davless* (1880), 102 U. S. 634, 26 L. ed. 263, n.; *George v. Tp. of Oxford* (1876), 16 Kan. 72.

A note referring to a contract incorporates it. *Markay v. Corey* (1895), 108 Mich. 184, 36 L. R. A. 117.

A railroad ticket incorporates schedules and time-tables. *Le Blanche v. London R. R.*

VERDICT: Its rendition. 1 Blsh. Cr. Proc. 1000-1016; *Clark, Crim. Proc.* 181-185; *Whart. Cr. Pl. & Pr.* 737-755. See *FINDINGS*: *Bouv. Dic.* Must conform to mandatory record. *Garland*: 60. See *THEORY*. Will not supply an omitted fact. *Hitchcock*: 12. Alder by verdict is a rule loosely expressed and understood. *Ut res magis*, etc.

VERIFICATION: Of false pleading is perjury. See *PERJURY*.

Purpose of. *Bliss*, Pl. 172. On principle, it should be positive. *Form of.* *Bliss*, Pl. 173. *Anthony*, 64 Neb. 506, 97 Am. St. 662 (need not be positive).

Verification.—

Agent cannot verify for a defendant. *Warman* (Ill.). But one plaintiff may verify for several. *Patterson v. Ely* (1861), 19 Cal. 28.

VESTED RIGHTS: See *Bronson*: 238; *Dash*: 237a; *Terry*: 240. *Ita lex scripta est*. See *RETROSPECTIVE DECISIONS*; 8 Cyc. 894-929.

Rule of property. *And. Dic.* 912, 1088.

VETO: Power to veto only part of a statute. *C. ex rel. Elkin*, 199 Pa. 161, 55 L. R. A. 882, n.

VEZATIOUS SUIT: *Bouv. Dic.* See *MALICIOUS PROSECUTION*.

VIA TRITA, VIA TUTA: The old way is the safe way. 5 Pet. 223; *Bro. Max.* 134.

VICARS v. WILCOCKS (1807), 8 East, 1, 2 Sm. L. C. 549-581, 521-557, 11th ed. (reviews English cases); *Sedgk. L. C. Dam.* 720; 2 *Smith, C. Torts*, 72, 134 N. Y. 478, 15 L. R. A. 388; 3 *Pars. Conts.* 193, *Bro. Max.* 207, *New. Def.* 929, *Mews' E. C. L., Suth. Dam. q. v., Sto. Ag., Whart., Cool. Torts, Blsh., Add., Bigl.*; 36 Am. St. 809, 840 (*resume of cases*); 2 *Gr. Ev.* 256; *Crain*, 6 Hill, 522, 41 Am. Dec. 765. *Cited*, § 343, *Hughes' Proc.*; § 67, *Gr. & Rud.*

Vicars stated: Proximate and remote cause. W.'s cordage was maliciously cut, and he accused V., who was a servant of O.'s and hired for a fixed and entire period. (*Cutter*: 308.) O. summarily discharged V. who failed to get employment of P., probably because of the injurious charges made against him. Consequently V. sued W. for slander, and the suit failed for two reasons: 1. Because his discharge by O. was not a legal consequence of the words spoken. His discharge was illegal—was an illegal consequence. Servants cannot be discharged in such a summary way: upon suspicion, unproved charges, without a fair hearing. 2. It did not appear that P. refused to employ him solely because of W.'s inculpatory charges; it may have been for other reasons—possibly because O. had just discharged him, and P. might not wish to appear as harboring a discharged servant, as this might be construed offensively by W. Consequently, P.'s refusal to employ him was too remote. This case is widely cited in discussions of defamation, torts and trespass. It presents an instructive phase of remoteness, privity, remote and proximate cause.

False statement, depriving one of employment, is actionable, and a recovery may be had for injured feelings. *Lombard*, 155 Mass. 70, 31 Am. St. 528, n. See cases: 36 Am. St. 802-861; *Squib Case*; *Langridge*; *Thomas*; *Lumley*; *Sharp*; *Lancaster* (1904), 70 Ohio 156, 65 L. R. A. 856. *In jure non remota*.

The court would not presume what was not alleged and proved. *Cruikshank*: 232; *Verba fortius*.

VICKSBURG WATER WORKS CO. v. *Vicksburg* (1902), 185 U. S. 65. *Cited*, § 40, *Gr. & Rud.*

VICTORIAN E. B. COMMISSIONERS v. *Goultas* (1888), 13 Ap. Cas. 222, *Ames, C. Torts*, 13, 8 *Rul. Cas.* 405, *Mews' E. C. L.* 265, 266; 36 Am. St. 828, 1 *Suth. Dam.* 21; 92 *Tex.* 242, 77 Am. St. 859, 93 *Tex.* 243. §§ 343, 347, *Hughes' Proc.*; §§ 63, 296, *Gr. & Rud.*

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Victorian stated: In Australia, near Melbourne, Mr. and Mrs. Coultas and her brother were driving in a buggy and came to a R. R. crossing, the gates of which were in charge of a keeper who was a servant of the R. R. He let the passengers through the first gate and was proceeding, followed by them, across the tracks to open the second gate when he saw a rapidly approaching train. He shouted to the occupants of the buggy to go back, which it seems they could not well do, and instead they ordered him to open the further gate, which he failed to do. However, they drove against it so closely that the train did not touch the buggy. *There was no actual impact.*

As the train approached, Mrs. C. from terror fainted and fell forward in her brother's arms. From the fright she suffered a nervous shock, which superinduced a spell of sickness. The husband and wife sued the R. R. for damages, and he was awarded \$342.2s. damages and she £400. The R. R. appealed, insisting, 1. The damages were remote (*In jure non remota*, etc.); 2. There was no physical impact or damage caused thereby; 3. No recovery should follow for physical and mental injuries caused by fright alone. The appellant was sustained upon all these counts.

Generally there can be no recovery from fright or mental suffering, when there was no physical damage. Notes 8 Rul. Cas. 409-419 (reviewing *Jurats of Romney Marsh*; *Sharp v. Powell*; *Burrows*; *Munster v. Lamb*; *Radley*; *Butterfield*; *Lynch*; *Bird v. Holbrook*; *Hadley*; *Lynch v. Knight*; *Fitzpatrick v. R. R.*, 12 U. C. Q. B. 645; *Hill v. Kimbell*, 76 Tex. 210, 7 L. R. A. 618; *Ill. R. R. v. Latimer*, 128 Ill. 163; *Purcell v. R. R.*, 48 Minn. 134, wherein is discussed the "*Squib Case*" and the "*Wine Cask Case*" (*Vandenburgh*). The foregoing cases are widely cited in the law of torts, negligence and damages. The Victorian Case should be well comprehended.

Mental anguish and physical pain are elements of compensatory damages. McKinley, 44 Iowa, 314, 24 Am. Rep. 748-754; notes, 41 Am. St. 23; cases; 1 Suth. Dam. 95-97; 3 *id.* 1214 (defamation); *Terwilliger*, sub *Pollard*; West. U. Tel. Co., 71 Tex. 507, 10 Am. St. 772-780, ext. n. (failure to deliver telegram), 1 L. R. A. 723; *Friel*, 69 N. H. 498, 76 Am. St. 190 (malicious attachment). *Contra*, Western U. Tel. (1867), 15 Mich. 525, 2 Thomp. Neg. 328, ext. n., 7 Am. Law Reg. (N. S.) 18, Allen, Tel. Cas. 345, 9 Am. R. R. & Corp. Rep. 749; Cool., Bish. Torts; Sedgk. Dam.; Shear., Whart. Neg., Pars., Chit. Conts.; Primrose, 154 U. S. 1-34; cases; 9 Am. R. R. & Corp. Rep. 772-774 (contract limiting liability); W. U. T. Co., 82 Tex. 561, 27 Am. St. 918-992, ext. n., 15 L. R. A. 120 (duty to find the addressed person); Morgan, 95 Cal. 510, 17 L. R. A. 71-80, ext. n.

Fright as an element of damages. Physical injury resulting from a nervous shock is not actionable. Huston, 212 Pa. 548, 3 L. R. A. (N. S.) 49-69. *Contra*, 36 Am. St. 828.

A miscarriage caused by one abusing the husband in the presence of the wife is

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actionable. 36 Am. St. 828; Stutz, 73 Wis. 147, 9 Am. St. 769 (fright as an element); Gulf R. R., 93 Tex. 239, 77 Am. St. 856-863, ext. n. (recovery for fright). *Contra*, Nelson, 122 Mich. 466, 80 Am. St. 577. See *Actio personalis*.

Mental suffering as an element. T. & F. R. R., 91 Tex. 31 (a woman recovered damages caused by wrong ticket causing delay); Mabry, 116 Ga. 624, 94 Am. St. 141 (expulsion from cars); Mech. Cas. Dam. 642-660.

VIEW OF PREMISES: See *Res ipsa loquitur*.

VIGILANTIBUS ET NON DORMIENTIBUS jura subveniunt: The laws serve the vigilant, not those who sleep over their rights. Bro. Max. 892-903. Cited, §§ 40, 64, 65, 164, Gr. & Rud.

LEADING CASES: *Whitcomb v. Whiting*; *Bell v. Morrison*; *Catlin v. Skoulding*; *Pearson v. Smith*; *Backhouse v. Bonomi*; *Whitehouse v. Fellows*; *Terry v. Anderson*; *Taylor d. Atkins v. Horde*; *Nepean v. Doe*; *Michoud v. Girod*; *Warren v. Slade* (computation of time). See And. Dic., 1 Pom. Eq. 418, 1 Beach, 17, Sto. 759; **LIMITATIONS.**

Another form is: *Lex vigilantibus favet*: The law favors the vigilant. 11 L. R. A. 471. See *New York City v. Pine* (1902), 185 U. S. 93, 98 (equity requires diligence). See also **EQUITY**; **LACHES**.

One must know the contract he signs. Williams v. Stoll, 118 Wis. 400, 442 (*Caveat emptor*).

The law favors intelligence and morality. See **INTELLIGENCE.** *Mining claims*; laches strictly applied to. Patterson, 195 U. S. 309; cases.

VILMONT: See Bentley v. Vilmont.

VIRGINIA: The mandatory record is not strictly respected. Replies are waived; evidence of waiver is sought in the statutory record. Deatricks v. State Ins. Co. (1907), 107 Va. 602, 59 S. E. 489, 13 Va. Law Reg. 952.

VIRGINIA COUPON CASES: L.C. 285a.

VOGT v. SCHIENEBECK: L.C. 324a.

VOID: Bouv.; And. Dic. Void instrument. See **FORGERY**.

VOID AND VOIDABLE: Bish. Conts. 610-622; Ans. 204-206, Whart. 28, 145. §§ 66, 109, Hughes' Proc.

VOID IN PART, VOID IN TOTO: 15 N. Y. 9, 96. This idea applies to defenses of accident and to a judgment. See **JUDGMENTS**; *Rison v. Farr*; *Mallan v. May*; 373; cases; **REPUGNANCY**. It does not apply in construction without exception. *Ut res magis valeat.*

Contracts may be valid in part and void in part. Mallan: 373; Pigot's Case.

Void in part, void in toto applies to pleadings. *Rison v. Farr*. See **REPUGNANCY**.

VOID THINGS CANNOT BE WAIVED or aided. Rushton: 5; R. v. Waters: 71; R. v. Waverton: 70; Shutte: 291; Hume v. Robinson; Pennoyer: 58; *Quod ab initio*. See Colorado cases, sub *Thomas v. Mackey*: 15.

VOIR DIRE EXAMINATIONS: Should be prompt. 1 Whart. Ev. 492; 1 Gr. Ev. 424, 433; Bouv. Dic. Of jurors: right to. Handy v. S., 101 Md. 39, 109 Am. St. 558-568, ext. n.

VOLENTI NON FIT INJURIA: That to which a person assents is not esteemed in law an injury. Bro. Max. 268-278; 1 Labatt, Mas. & Serv. 368-386 (largest resume); 2 *id.* 888; 2 Eddy, Comb. 697

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(restraint of trade); *Howe's Civil Law*, 300, 302; 95 U. S. 439, 441; 69 L. R. A. 469-474; 6 Wall. 290 (Procedure).
Cited, §§ 18, 25, 27, 87, 167, 169a, 174, 219a, 239, 304, 344, *Hughes' Proc.*; §§ 40, 46, 55, 82, 293-295, 304, 306, Gr. & Rud.
MAXIMS AND LEADING CASES: *Consensus tollit errorem*; *Communis error facit ius*; *Allegans contraria non est audiendus*; *Fabula non iudicium*.
Montgomery v. Edwards: 292; *Lough v. Outerbridge*: 293; *Insurance Co. v. Folsom*: 157 (one inviting or consenting to error that is waivable in character cannot complain of it. 6 Wall. 290 — Procedure. *Consensus tollit errorem*. See **EQUITABLE ESTOPPEL**).
S. v. Beck (fighting by agreement does not bar a recovery).
Slaughter v. State (1901), 113 Ga. 284, 84 Am. St. 242, n.; *S. v. Beck*: cases (decoying one into commission of crime as an element of defense).
Bird v. Holbrook; *Hooker v. Miller* (one committing a trespass may not be injured by a spring gun or other dangerous instrument).
Gill v. U. S. (consent to damage condones injury).
Hegarty v. Shine (consent to illegality, out of which an injury arises, bars a recovery).
Sutton v. Wauwatosa (traveling on Sunday in violation of a statute will not bar a recovery for an injury from a defective highway).
Davies v. Mann (one guilty of contributory negligence may sometimes recover). See *Bolin v. R. R.* (1900), 108 Wis. 333, 81 Am. St. 811-829, n. (contributory negligence bars a recovery—strict rule—comparative negligence not the law of all states); *Weisshaar v. Kimball Co.* (1904), 128 Fed. 397, 65 L. R. A. 84 (rule in *Davies v. Mann*).
Butterfield v. Forrester (contributory negligence bars a recovery).
Sweeney v. Old Colony R. R. (duty of traveler to "stop, look and listen" before crossing railway track); *Davies*; *Scott*.
Gibney v. S. (contribution to injury by involuntary action caused by fright or overwhelming impulse).
R. v. Longbottom (criminal negligence supplies malice).
Billings v. Accident Ins. Co. (suicide forfeits rights to insurance, if policy so provides. See *Verba intentione*, etc., or rights under statutes. *Osgood v. R. R.*).
Harper v. City Ins. Co.: 218 (the assured may use property in an ordinary way, although it is in violation of express words in the policy).
Indemaur v. Dames; *Heaven v. Pender* (visitor on premises: his right to recover for injuries).
Smeed v. Foord (minimizing damages is a duty).
Texas & P. R. R. v. White (one must not aggravate his damages, either from negligence or ignorance, *post*).
Volenti non fit injuria is one of the great universal juridical maxims. It cannot be eliminated, and attempts to do so are often attacks upon *Caveat emptor*, or *Ignorantia legis neminem excusat*. Enlightened jurisprudence opens the way for intellectual progress and freedom to contract, and to assume risks in all relations unmixd with public policy. *Hughes' Conts.*, § 18.
Either augmentation or diminution of this maxim affects jurisprudence throughout. See WAIVER. Risks men may not contract

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to assume, legislation has no right to interfere with. One has no right to charge another with the consequences of his own folly. If one brings upon himself the injury of which he complains, he is not a *wronged* party, and under constitutions creating courts he has no right to appear therein. Reason is the soul of the law. *Lex est dictamen rationis*; *Fabula non iudicium*; *Yarmouth*; *U. P. R. v. Cappler*.

Assumption of risks by agents. *Labatt, Mas. & Serv.* 969-1225 (largest resume); *Huffc. Ag.* 283; *Roberts v. Smith, sub M'Manus*.

Assumption of risks by agents is often a part of the contract constituting the agency. On principle the agent may contract to assume the risk. Such a contract is neither *malum in se* nor *malum prohibitum*. The assumption of the risk may be either express or implied. In the absence of fraud, deception or the fault of the employer such contracts are valid. Any other view is not affording remedies by constitutional courts but intermixes elements of confiscation or abuse of power.

Servants must take care of themselves; they must look and judge. In the absence of snares, of fraud and deception, the rule is like *Caveat emptor*. *Burke v. Davis* (1906), 191 Mass. 20, 4 L. R. A. (N. S.) 971; *Priestly*.

Seduced person cannot recover. *Wrynn v. Downey* (1906), 27 R. I. 454, 4 L. R. A. (N. S.) 615-624, n.

Volenti, etc., as a defense to action by injured servants. *O'Maley*, 158 Mass. 135, 47 L. R. A. 161-200, ext. n. Voluntarily incurring danger to save life of another person, as contributory negligence. *Corbin*, 195 Pa. 461, 49 L. R. A. 715; *Gibney v. S.*

Effect of mutual fault or wrongdoing in libel case. 28 L. R. A. 721. See **DEFAMATION**; **SLANDER**. *Patton v. Cruce* (1904), 72 Ark. 421, 65 L. R. A. 937.

The defense of contributory negligence may be taken away by statute. *Fulton*, 133 Fed. 193, 68 L. R. A. 168. See *U. P. R. v. Cappler*.

Obedience or disobeying physician as affecting remedy of injured person against one who injured him. *Pearl v. West End Street R. R. Co.* (1900), 176 Mass. 177, 49 L. R. A. 826, n.; *Texas & P. R. R. v. White* (1900), 42 C. C. A. 86, 101 Fed. 828, 62 L. R. A. 90-93: cases; *Seibert*, 88 Mo. 72, 70 L. R. A. 72 (lack of care).

Use of sidewalk, knowing it is dangerous, is no negligence *per se*, such as to preclude a recovery, as a matter of law. *Mosheuvel v. D. C.* (1903), 191 U. S. 247; *contra* cases.

Must be pleaded when. *Birsch v. Electric Co.* (1908), — Mont. —, 66 Cent. L. J. 388: cases.

VOLUIT SED NON DIXIT: He willed, but did not say. 4 Kent, 538.

VOLUNTARY CONVEYANCES: *Bouv. Dic. See FRAUDULENT CONVEYANCES.*

VOLUNTARY PAYMENTS: What are. *Chesebrough v. U. S.* (1904), 192 U. S. 253: cases (if, under protest or notice of intention to contest, is not voluntary). *Union Pacific R. R. v. Dodge County* (1878), 98 U. S. 541; *Mayor v. Lefferman* (1846), 4 Gill, 425, 45 Am. Dec. 145, ext. n.; *Lamborn v. County Commissioners* (1877), 97 U. S. 181; *Cuba Co.*, 200 U. S. 488; *Scott v. Ford*; *New*

Voluntary Payments.—

Orleans R. R. v. Louisiana Co. (1902), 109 La. 13, 94 Am. St. 395-444, ext. n.; 2 Whart. Conts. 756; Wessel v. Johnston Land, etc. Co. (1893), 3 N. Dak. 160, 44 Am. St. 529, n.; Keener, Quasi Conts. 423; 1 Beach. Pub. Corp. 230-236; 2 id. 1636; 2 Dill. Munic. Corp. 94-97; 1 Beach, Conts. 365, 380, 381, 687; Cool. Tax., q. v.; U. S. v. Wilson (1897), 168 U. S. 273, 42 L. ed. 464; Bro. Max. 275-277; Knowlton v. Moore (1900), 178 U. S. 41 (payment under protest sufficient). When recoverable. § 72, Hughes' Conts.; 2 Whart. 756; 2 Page, 797; cited, § 306, Gr. & Rud.

In the absence of fraud, deceit and undue influence, money voluntarily paid in ignorance of law cannot be recovered. Scott v. Ford, 68 L. R. A. 469-477.

Duress; doctrines. Hatter v. Greenlee (1834), 1 Porter (Ala.), 222, 26 Am. Dec. 370-378, n.; Mayor v. Lefferman, *supra*; Sasportas v. Jennings; Joannin v. Ogilvie (1892), 49 Minn. 564, 32 Am. St. 581, n., 16 L. R. A. 376 (duress of property), 3 Gr. Ev. 8; 2 Page, Conts. 799-815. See **DURESS**; Sasportas; Watkins v. Baird; MONEY HAD AND RECEIVED.

Illegal taxes voluntarily paid; when recoverable. Pennock v. Douglas County (1894), 39 Neb. 293, 42 Am. St. 579, 591, ext. n., 27 L. R. A. 121; 2 Dill. Corp. 939-947; 1 Beach, Corp. 230-239, 4 L. R. A. 300-305, n.; Volenti non fit injuria.

Right to recover taxes voluntarily paid depends on a statute. Wilson v. Butler Co. (1890), 26 Neb. 676, 4 L. R. A. 589; Budge, 1 N. Dak. 309, 10 L. R. A. 165, n. See **TAXATION**.

VON HOFFMAN v. QUINCY: L.C. 239. **VOCKEES v. BANK OF U. S.:** L.C. 119.

VOSBURGH v. MOAK: See **JOINT TRESPASSERS**; Kirkwood v. Miller; Squib Case. §§ 20, 310, 342, Hughes' Proc.; § 296, Gr. & Rud.

Vosburgh stated: Boys were playing ball near a highway. The pitcher so tossed the ball as to strike a pedestrian thereon. All were held liable. Participation in the game constituted the basis of liability. All agreed to play. In the *Squib Case*, Vandemburgh and Guille the acts were involuntary as to those not liable. See Woodward v. Miller (privacy); Laidlaw v. Sage, *sub* Scott v. Shepherd.

Infants liable for torts like adults. Gilson v. Spear; Scott v. Shepherd (an infant threw the squib). The doctrine of privacy in tort is very analogous to that of tacking and collateral intent. Spies v. P.: cases.

VOTING: Mistake in belief as to right of. U. S. v. Anthony; McClain, C. L., q. v.

WABASH R. R. v. FRIEDMAN: L.C. 137.

WACO WATER CO. v. WACO: L.C. 300. **WADHAM v. SWAN** (1884), 109 Ill. 46. Traverse (denial) must not be too broad nor too narrow. And. Steph. Pl., § 139, p. 296. See **DENIALS**.

WADSWORTH v. WENDALL (Deeds without a seal; effect of). See **HIBBLEWHITE**.

WAGER: Law of. Good: 358; 2 Beach, Conts. 1466-1497; Bouv. 1204, 1205; And. Dic.; 1 Page, 448-454.

Fraudulent, as constituting larceny. McClain, C. L. 560. See **LARCENY**.

WAGNER v. GIBBS: L.C. 290.

WADE v. WALTERS: L.C. 335.

WAITE v. BY.: See **LYNCH**; **SCOTT**.

WAIVER: Is founded on convenience, necessity and reason. §§ 46, 53 (convenience), 55-61, Gr. & Rud.

Is inferred from acts. § 255, id.; § 29, *post*. Implicates the conserving policies. §§ 5, 9, 61, 103, 227, 233, 238, 250-255 Gr. & Rud.

Of pleadings. §§ 147, 225, 238, id.

Limits of. §§ 53, 56-59, 180, 186, 225-227, 238, 251, id.

Is favored. §§ 53, 225-227, 235, id.

What cannot be waived. §§ 53, 56-59, 63, 88-90, 94, 103, 108, 122, 144, 158, 186, 225-227, 235, id.

Mandatory requirements cannot be. §§ 56, 93, 103, 147, 186, 225-227, 238, id.

§ 1. **MAXIMS AND LEADING CASES:** Interest reipublice ut sit finis litium; Consensus tollit errorem; Quod approbo non reprobo; Consensus facit legem; Communis error facit jus; Modus et conventio vincunt legem; Quilibet potest renunciare juri pro se introducto; Allegans contraria non est audiendus; Volenti non fit injuria; Quod ab initio non valet in tractu temporis non convalescit; Omnia presumuntur rite, etc.; Frustra probatur quod probatum non relevat; Pacta privata juri publico derogare non possunt; Pacta conventa, etc.; Privatorum conventio juri publico non derogat; De minimis non curat lex; Ita lex scripta est.

Windsor: 1 (due process of law essentials can not be waived); Campbell: 2 (one may demur to his own pleading); Cumber: 311; Cooper v. Reynolds (liberal rule of waiver); Shuttle: 291; Saunderson v. Herman (Frustra probatur quod probatum non relevat); Miller v. Dill: 290b (general objections are not available for waivable matter); Grand Trunk R. R. v. Ives: 290c (notice of review essential); Montgomery v. Edwards: 292 (delay is waiver; objections must be apt and specific); Lough v. Outerbridge: 293 (formal matter may be waived); Conductors' Benefit Association: 294 (rehearings must not include a new case); Hand: 395 (Volenti non fit injuria); Brewer Brewing Co.: 296 (waivable error omitted in a motion for a new trial is waived forever); Garland v. Wholebaw: 297 (one cannot change his base on an appeal); Kraner: 299 (formal objections must not be too broad); Douglas v. Whiting; Ransom v. Williams: 122 (absence of essential matter subjects proceedings to collateral attack); Deitsch v. Wiggins (informal matter may be waived).

§ 2. **Waiver is a leading element of the law.** It affects the six leading subjects, Procedure (Evidence, Pleading and Practice), Equity, Contract, Crime, Tort and Construction.

It is an element that must be conceded to be wholly within the province of contract, stipulation and legislative domain.

§ 2a. **Waivable and non-waivable matters.** There are matters one may abandon at his pleasure; there are matters that are personal and may be relinquished, if only the intention to abandon is signified either expressly or impliedly. *Consensus tollit errorem*. But all matters cannot be contracted or stipulated away nor

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abandoned nor relinquished. There are matters that concern the whole public, which for reasons of public policy cannot be aliened or stipulated away. *Id quod nostrum, sine facto nostro, ad alium transferri non potest.* Two cannot contract for a third. The stranger to a compact may forever demur and plead there-to *Non hæc in fœdera veni.* This defence is deep; it springs from the prescriptive constitution; legislatures cannot abolish it; intelligent, patriotic parliaments, conventions and associations will not attempt to abolish it; this defense may be raised on general demurrer or renewed or first raised on motion in arrest, or first raised or renewed on collateral attack; it cannot be waived. See §§ 56-61, Vol. I, Gr. & Rud.; also views from Estoppel and Collateral Attack, §§ 171-261, *id.*

- § 3. *The mandatory requirements of a constitutionalism cannot be waived.* § 56, Gr. & Rud. It is only dilatory or abatement matter that can be waived or abandoned. That record and that matter which must be evinced therefrom to support proceedings whenever these are assailed by objections upon collateral attack cannot be waived. §§ 256-61, Gr. & Rud.

Mandatory provisions of constitutions and of statutes cannot be waived, but directory provisions may be. Kelly: 285.

- § 4. *Interest reipublicæ ut sit finis litium* is an important principle, but before it can be applied there must be properly shown the fact that there has been litigation; in showing this there arises that first rule of evidence, "*What ought to be of record must be proved by record and by the right record.*" *Interest reipublicæ* is the basic maxim of *res adjudicata*; it is an estoppel of record proposition, consequently there is involved the record, *res adjudicata* together with all the other matters mentioned, with all of their technicalities. On the one hand is the fundamental right to be heard according to due process of law (without sale, denial or delay) and on the other hand the operation of the principle of *Interest reipublicæ*. Improperly to apply this principle is forfeiture, confiscation and oppression; and likewise are the consequences when it is denied. From this viewpoint appears the fact that tech-

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nicalities necessarily arise in procedure, and further, that these technicalities are the safeguards of the law and cannot be extirpated or abolished. Technicalities of the law are its safeguards. Windsor: 1; Munday: 79; Bristow: 135; Sache. Parliaments and conventions that deny the above prepositions mislead and deceive the beginner and the inexperienced student. Codes have not and cannot abolish the technicalities that attach to the operations of *De non apparentibus, Frustra probatur quod probatum non relevat* and *Verba fortius accipiuntur contra proferentem.* The attempts of Illinois and Missouri by statutes of Amendments and Jeofails to abolish technicalities have resulted in a climax of absurdities and the wreck of principles. See ILLINOIS; MISSOURI; JEOPARDY; CODE; CONSTRUCTION; Rush-ton: 5; J'Anson: 91; Dovaston: 217; THEORY OF THE CASE; VARIANCE; *Verba fortius.*

- § 5. *Codes and practice acts have not and cannot abolish technicalities upon which depends the application of fundamental principles.* Mallinckrodt: 12a, also under Title M, *supra*, and quoted sub THEORY OF THE CASE. Mallinckrodt is a sound and instructive case. It sustains the view that the code will not bear transcendent construction; that the code will not support the Theory of the Case; indeed that the code has made no change of the law. Indianapolis: 223.

- § 6. *Abatement or dilatory or formal matter may be waived.* The Thirteenth Conserving Principle (§ 103, Vol. I.) is thus expressed: "The policy to speed the disposition of causes upon their merits, also when to disregard dilatory or abatement matter, must be rightly understood." This principle springs from the prescriptive constitution; it is the same in all systems when intelligently administered. It is absurd to say that one could enter his appearance and assume to contest a case on its merits and then say he was not heard because no summons issued or was served, or is not shown from the record. A general appearance waives all that relates to summons, monition, citation, subpoena or warning. Quinn v. P.; Thomas v. R. R. A denial of this proposition is nonsense. The command of statutes however peremptory and unqualified

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for a summons is waived by general appearance (*Cessante ratione legis cessat ipsa lex*); after this to insist upon the ceremony required by a statute as to a summons would be raising a technicality not to be entertained. *Modus et conventio vincunt legem*. Relating to abatement and formal matter, the old law and the new law are in concord; formal and abatement matter is waived if not aptly and properly objected to. *Consensus tollit errorem*; L. C. 290a-299; see ABATEMENT; MERITS; DOVASTON: 217.

§ 7. *Courts, authors, reviewers and bar associations denouncing the above principles injure and mislead. See THEORY OF THE CASE, also VARIANCE: Puzzles 1 and 2.* The Theory of the Case, also the supposed distinctions between "adjective" and "substantive" law, are euphemisms; they are hidden rocks, that are wrecking the most valuable asset of states and governments. The children of these vicious illusions are statutes of jeofails, the denouncement of maxims, the theory of the case and a due process of law for every tribe or province that is constituted in defiance of the maxim above cited, of congruity and uniformity of law. Discussions of these matters are as vast and confusing as are those relating to *Shelley's Case* or the Sunday laws.

§ 8. *Mandatory requirements are waived where these will not be considered without regard to the statutory record and the assignment of errors thereon.* There are cases reversed upon the mandatory record alone, as in *Windsor*: 1, *Perez*: 2e and *Planing Mill Co.*: 2d. In courts that respect the rule, that the general demurrer searches the whole record and attaches to the first fault, the statutory record is of no consequence. Of course where a record may be assailed upon collateral attack the statutory record is not opened or considered or required. But in courts where pleadings and the mandatory record are waived and where the statutory record and assignments of error thereon are indispensable for a review, there is recognized the theory of the case with all its extreme and erratic consequences. There is reason for saying that cases in the supreme court of the United States from the highest court of a state seem to come within the latter class. See *Winona*;

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FEDERAL QUESTION. From the decisions it seems that cases vulnerable to collateral attack are not a subject of review in the federal court without objection and exception and these appearing in the statutory record. In such cases grave error does not save itself. *Mallinckrodt, supra*; *Perez*: 2e; *Quod ab initio*. See ASSIGNMENT OF ERROR; APPELLATE PROCEDURE.

§ 8a. *Waiver in Procedure.* In procedure the doctrine of waiver must be grasped from the conserving principles of procedure (§§ 83-123, Gr. & Rud.), which are enumerated and elucidated throughout this work. It often involves questions germane to the police power. Here it may be said that, generally, whatever affects the integrity of the conserving principles of procedure cannot be waived.

See ABATEMENT; LEADING CASES, 215-233, 290a-299; *Consensus tollit errorem*; *Modus et conventio vincunt legem*; *Quod ab initio non valet in tractu temporis non convalescit*; GOVERNMENT; CONSTITUTIONALISM; RECORDS; PLEADINGS; 1 Cyc. 135-137.

§ 9. *Waiver in contract.* Contract law presents waiver in many aspects, relating to which it may be observed that all contracts of competent parties are valid, unless forbidden for reasons of public policy. *Salus populi suprema lex*. What may be waived is a matter of lawful contract in procedure; but otherwise as to what cannot be waived. This should be comprehended. *Bish. Conts.* 94, 95 (waiver of statutes made for one's own benefit; the defence to a barred debt may be waived. *Truman*).

This view arises from government and its scheme of protection, education and moral advancement. Associated with reflections herefrom arise the conserving principles.

See RATIFICATION; CONFIRMATION; ELECTION; ACQUIESCENCE; *Quod ab initio*.

§ 10. *Crime also involves waiver*, and especially from considerations of that basic maxim of torts, *Volenti non fit injuria*. See *S. v. Beck*: cases.

§ 11. *Torts involve extended considerations of waiver*; its ramifications therein may be traced from *Volenti non fit injuria*: cases.

§ 12. *Construction, its maxims and leading cases are profoundly affected by what can be and what cannot be waived.* This will appear from a consideration of the conserving principles of procedure. See L. C. 215-233: cases; 290a-299: cases.

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What can be waived is directory; what cannot be, is mandatory. Every disturbance of the law of waiver is a disturbance of the foregoing subjects. All of them appear as affines when viewed from the law of waiver.

§ 13. *Rationale of waiver*: "A man who does not speak when he ought shall not be heard when he desires to speak," is a very excellent definition of waiver for the practitioner, although that was remarked in a contract case where an equitable estoppel was applied.

L'Amoreaux v. Vischer (1849), 2 N. Y. 278, 281, quoted Bro. Max. 138 (under *Consensus tollit errorem*). See ABATEMENT (rationale of waiver). 2 Bouv. 1207; And. Dic.

§ 14. *Unsettled law of waiver*. In the last fifty years the law of waiver in some states has been given an incomprehensible and constantly widening scope, and to the extent of substituting the statutory for the mandatory record, and indeed of taking for the foundation of judgments several kinds of matter. It has been made the truculent, voracious and all-devouring assailant of the latter record, which, in several states, is practically extirpated as the basis of certainty and the support of the conserving principles of procedure.

See MANDATORY RECORD; LITERATURE; MAXIMS; PLEADINGS; PROCEDURE; *Res adjudicata*; cases; RECORD; JURISDICTION; Hughes' Proc.

In other words, the principle in *Consensus tollit errorem* is made destructive of that in *De non apparentibus et non existentibus eadem est ratio*, which is a part of *Salus populi suprema lex*.

The old law—comprehended within *De non apparentibus*, etc., *Quod ab initio*, etc., *Frustra probatur quod probatum non relevat*, and their cognate cases, *Rushton*: 5 and *Bristow*: 135—has been made so confused and uncertain as to rob procedure of most of its protective force, in many cases. See *Cujus est instituere*, etc.; MAXIMS, Hughes' Proc.

Out of waiver, consent and acquiescence, courts are carving causes of actions, or ground of defense, and setting them up in a most astonishing and arbitrary manner. They start and sail without compass, chart, star or sextant. See THEORY; *Res adjudicata*; cases; VARIANCE.

Limitations of waiver appear from a consideration of requirements of the conserving principles of procedure.

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§ 15. *Essentials or mandatory matters in procedure cannot be waived or contracted away*. Procedure and its means often involve third persons, also government. Now, whatever concerns more than two, cannot be waived or dispensed with by two only. *Res inter alios acta*; *Non hæc in fœdera veni*; *Fabula non judicium*; *Salus populi suprema lex*; *Pactis privatorum*; *Pacta conventa*, Bish. Conts. 94, 95. To illustrate, a jury must try a criminal case. Generally, constitutions so provide. Now, if the judge tried a cause that should have been tried by a jury, this would render the proceedings void, or *coram non judice*. See *Schick*; *Turney*.

Further to illustrate, Milligan could not have consented to the trial by a court martial in territory over which the civil tribunals were presiding and exercising their jurisdiction. Had he consented expressly, and had the record shown this fact, still the proceedings would have been *coram non judice* and void. Such would be open to collateral attack. See *Milligan's Case*.

If an ambassador or consul were to consent to a state court adjudicating any interest concerning them, on principle such adjudication would be void. *Fabula non judicium*; *Weltmer*: 268a.

It should be observed that, as a rule, whatever is subject to general demurrer or motion in arrest of judgment, or *Non obstante veredicto*, or collateral attack, is not cured or aided by waiver. Where waiver is enlarged these matters are diminished.

See COLLATERAL ATTACK; *Debile fundamentum fallit opus*; *Campbell*: 2; *McAllister*: 3; JURISDICTION; *Windsor*: 1; *Munday*: 79. §§ 6-12, Hughes' Proc.; §§ 206-234, 242, Vol. I, Gr. & Rud.

Beaumont: 367, has been elucidated. Here we will further observe that if the court in that case had entered judgment upon the palpably illegal demand, such a judgment could not be upheld or validated by acquiescence or waiver. See *Rensberger*. *Fabula non judicium*.

§ 16. *Fundamental rules of procedure*. In connection with the above views, it should be thoroughly understood that what can be waived must be excepted to, and this shown by the statutory record only. What cannot be waived need not be excepted to, if the defect appears upon the manda-

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tory record, is in *Windsor*: 1, *Munday*: 79, *Rushton* 5, or *Cruikshank*: 232. *Quod ab initio*.

§ 17. *What can be waived must be treated as abatement matter. See ABATEMENT.*

The rationale of waiver must be grasped as a reciprocal of other matters. The practitioner must view it from the conserving principles of procedure, and particularly from collateral attack, for it seems quite safe to say, that whatever is necessary to protect a record from objections upon collateral attack cannot be waived. In a general way, it should be comprehended that everything necessary for the dominating principles of procedure is an indispensable that can not be waived.

To illustrate, it is observed that the conserving principles of procedure depend upon the mandatory record; therefore it cannot be waived. Elsewhere the cardinal idea is elucidated. §§ 83-123, Vol. I., Gr. & Rud.

Further, suppose in a state where a contract is void unless it is in writing, the statement of that contract, for a recovery or for a defense, omitted the allegation that it was in writing. How would such omission affect a judgment founded thereon upon collateral attack?

See Rushton: 5; *Cruikshank*: 232; notes, *Lamplugh*: 301; *Weltmer*: 268a; *PLEADINGS*; *Fabula*; *De non apparentibus*.

In this connection it is also well expressly to add that whatever affects the conserving principles of procedure affects third persons, or, as already explained, government itself. Now, wherever third persons are involved, two cannot waive or contract to affect their rights, and generally in procedure, as in contract, the attempt to do so is a void act or compact. *Res inter alios acta*; *Privatorum conventio juri publico non derogat*; *Quod ab initio non valet intractu temporis non convallescit*; *Frustra probatur quod probatum non relevat*; *Salus populi suprema lex*.

To what extent one may waive as regards the conserving principles, is a leading question in procedure. *See Hughes' Proc.*; §§ 83-123, Gr. & Rud. Under "LITERATURE" this is dwelt upon, and therein illustrations are made from *Beaumont*: 367 and other cases. To draw attention further it is here asked, if Miss Beaumont and

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Reeve had agreed to the establishment of a judgment upon the foundation she offered in that case, would that have concluded the court? Will waiver by contract, express or implied, confer jurisdiction of an illegal subject matter? *See In pari delicto*; *JURISDICTION*.

From such considerations an important rule of contract law arises, viz.: that parties cannot contract a procedure for themselves that will detract from the conserving principles of procedure.

§§ 14-18, *Hughes' Conts.*; pp. 8-17, *Hughes' Proc.*; §§ 83-123, Gr. & Rud.; *Weltmer*: 268a.

If parties were expressly to agree to have a proceeding in a court of record, and therein agree to waive pleadings and the clerk and his functions, and thereby convert a court of record into an inferior or statutory tribunal, such a compact would be void. *Campbell v. Greer*: 2a (Mo.) The proceedings would be *coram non jndice*, and therefore open to collateral attack.

Parties cannot by contract, either express or implied, renounce the ways and means of a constitutionalism and thereby take on and establish the ways of an absolutism. *Salus populi suprema lex*. §§ 56-61, Vol. I, Gr. & Rud.

Pleadings cannot be waived. Cruikshank: 232; *Windsor*: 1; *Campbell*: 2. *See LITERATURE*; *MAXIMS*; *JURISDICTION*; *Fabula non judicium*; *PLEADINGS*; *RECORD*; *PROCEDURE*.

What may and may not be waived, and what constitutes waiver, is a leading question, if we may judge from multitudes of decisions. Nothing is of greater concern to the practitioner, who is instructed in diametrically opposite ways in those states that waive pleadings—the common law (mandatory) record—and consequently all that depends upon it.

§ 18. *Waiver as a judicial element is whatever may be legally stipulated.* In other words, what one cannot waive he cannot stipulate. Repeating, for it is so important to know, what we may waive is, on principle, a subject-matter relating to which we may stipulate. Further, what one may stipulate about he may contract about. This brings into view much that is elsewhere observed in regard to contracts and procedure.

§ 19. *Parties cannot contract a procedure for themselves.* Legislatures cannot prescribe a procedure in dis-

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regard of the barriers for protection in constitutions for the common welfare.

§§ 16a, 27a, Hughes' Conts.; Campbell v. Greer: 2a; *Uno absurdo; Salus populi*. There are limitations of legislative power to interfere with procedure. These limitations are the same whether viewed from contract or from statutes. 1 Page, 347-358.

A right must affirmatively appear from the mandatory record. Its absence cannot be waived or condoned. A right to recover, or of a defense, must appear in allegations, not waiver, consent, acquiescence. Patterson, 3 Tex. 331, 335. Thomas v. Board: 10a (U. S.); Weltmer: 268a. See ALLEGATIONS; CAUSE OF ACTION; JURISDICTION.

Consent cannot supply an essential pleading. Ford (1849), 4 Tex. 492 (failure to accept irrelevant evidence will not make it available for any use; consent will not make an answer where none is filed).

Waiver limits as to jurisdiction. Beyer v. Le Fevre (1902), 186 U. S. 114; Harrigan, sub MAGNA.

Replying to a plea waives its defects of sufficiency (after demurrer overruled). P. v. Central Union Tel. Co. (1901), 192 Ill. 307, 85 Am. St. 338; Rensberger. See PRACTICAL CONSTRUCTION; ILLINOIS.

Waiver will not aid void things. Shutte: 291; Rushton: 5; R. v. Waters: 71; Garland: 60; *Quod ab initio*, etc.

Defenses not pleaded are waived. Bear, 124 N. C. 204, 70 Am. St. 586; Field: 84; J'Anson: 91.

A pleading bad on general demurrer is bad at later stages and on collateral attack. Mallinckrodt: 12a. Bro. Max. 602, 8th ed.; *Fabula*, etc.; *Jurisdiction*, etc.

Consent will not confer jurisdiction of subject-matter. Parties cannot contract that one shall consent to appear in deliction. *Fabula non judicium*. See COLLATERAL ATTACK; DEMURRER; MOTION IN ARREST; *Non obstante veredicto*.

Essential allegations cannot be waived. *De non apparentibus*, etc. See FLEADINGS; Campbell: 2; Craswell: 10; Hanford: 86; Rushton: 5; cases; R. v. Wheatley: 19; Moore v. C.: 21; Cruikshank: 232; *Fabula*, etc. Nor can answers or pleas. Munday: 79; J'Anson: 91; *Res adjudicata*. See COURT OF RECORD.

Limitations of waiver. Shutte: 291; Windsor: 1; Rushton: 5; Munday: 79; Garland: 60; Hume; Cooper v. Reynolds; Kraner: 299; *Consensus tollit errorem; Communis error facit jus; Modus et conventio vincunt legem; Quilibet potest renunciare juri pro se introducto; Conventio vincit legem*. See THEORY.

Waiver will never supply those principal things essential for *coram iudice* proceedings. Codes provide for the support of the conserving principles of procedure, as at common law. *Salus populi suprema lex*. *Consensus*, etc. Defenses not pleaded are waived. Field: 84; J'Anson: 91; Crepps: 113; Cromwell: 26. The mandatory record cannot be waived. Bro. Max. 602; Sto. Pl., § 10; Bliss, Pl. 422.

Objections upon collateral attack are forever available. Consequently appears the importance of the rule that the ground of the general demurrer is never waived; the general demurrer searches the whole record, and attaches to the first fault in all systems. Codes provide for this. The mandatory record cannot be waived. Bro. Max. 602; Sto. Pl. § 10; Bliss, Pl. 422.

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Its rationale pervades procedure. See CODE; MAXIMS; LITERATURE.

§ 20. Aider; waiver; ratification will not supply omitted allegations. Omitted allegations are not waived by appealing.

Rushton: 5; Van Leuven: 14; Dovaston: 217; *De non apparentibus*. There are limits of presumptions of regularity, of liberal construction and of judicial notice. Horan: 85; Munday: 79. See *Res adjudicata*: cases.

§ 21. From a primal—original—covenant of society much may be deduced, and particularly this, that no one's rights should be divested by official action until an adequate—a juridical—reason appeared therefor upon the mandatory record, and that the matter so presented was fairly and judicially treated. Windsor: 1; Campbell v. Greer: 2a; Clem: 2c.

§ 22. Under that covenant no man could agree he had violated the laws of the land. Unless he had, he would agree to a sham—moot—case, a myth; to do so, or to present such a case, is a contempt—a crime. For that no valid contract can be made. (*In pari delicto*.) Consequently the importance of an actual—real—existing subject-matter. *Fabula non judicium*.

Rensberger; Weltmer: 268a; Beaumont: 367. See LITERATURE.

§ 23. Mere consent will neither create that matter nor invest a court with jurisdiction of it. Therefore the rule of all systems, that a cause of action must be shown by the initial pleading. This is the rule in equity, in the criminal case, and under codes. Under these, aider by pleading over—by consent—acquiescence—waiver—is not recognized; an answer will not aid a bill in equity—nor the complaint or petition, nor will the reply, under codes. Devine. *Quod ab initio non valet in tractu temporis non convalet*. Anyway, such is the rule upon principle. The requirements of the conserving principles of procedure are attacked; wherever these are denied there follows an assault upon the congruity and integrity of those subjects. Here it should be observed that these matters bring into view third persons—the public—and therefore *Salus populi suprema lex*, *Res inter alios acta*, etc., *Id quod nostrum est, sine facto nostro ad alium transferri non potest, Nemo ex alterius facto prægrvari debet, Non hæc in fœdera veni* (I have not come into this compact).

§ 24. Enlargement of the law of

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waiver is an encroachment upon the above matters. Enlargement on the one hand means diminution on the other. Where waiver is enlarged its correlatives are encroached upon. *See* THEORY; *Verba fortius*.

§ 25. Waiver; limitations; rationale.

The *amicus curiæ* and all others who may raise the ground of the general demurrer, or of collateral attack, and are charged with constructive notice, and of other interests in the public policies of the mandatory record, are never foreclosed or barred by consent—acquiescence—waiver—fraud upon a court inducing it to exceed its jurisdiction and the safeguards of protection. They are not bound by the waiver nor by the contract of two. *Res inter alios acta*.

Campbell v. Porter: 2; Weltmer: 268a; *Jurisdictio est potestas*, etc.; *Fabula non judicium*.

From the foregoing may be deduced reasons for the limitations of the right to amend. Walden: 139; Horan: 85.

A void assessment roll cannot be waived, and the assessor making it may nevertheless object to it. Fletcher: 18. *Nulius commodum*, etc., does not apply. Consent will not confer jurisdiction of subject-matter. Omitted allegation is fatal to a pleading, and may be raised for the first time on appeal. Campbell: 2; Van Leuven: 14; Rushton: 5; cases, *sub* Hume; Thomas v. Mackey (Colo. cases). *See* L.C. 1-25, Vol. III.

§ 26. *What cannot be waived.* Generally it should be observed that whatever relates to a subject-matter and jurisdiction over it—essential pleadings—and the mandatory record—cannot be waived, dispensed with or abrogated. Here the rule that the parties cannot contract a procedure for themselves applies. This rule should be comprehended in the above relation. Further, it may be added, that whatever is essential for constructive notice and to resist collateral attack cannot be waived. These subjects involve the whole public—third persons—therefore *Res inter alios acta* applies. *See* Hughes' Conts., §§ 14-18. These are subjects of public policy, and whatever relates to this cannot be waived. *Salus populi suprema lex*; *Privatis pactionibus*, etc.; *Id quod nostrum*. The essential foundations of a judgment cannot be waived nor contracted away. Proceedings without the right and sufficient record are *coram non iudice*. The exercise of jurisdiction must be authorized by a proper and

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sufficient record in a constitutionalism.

See Res adjudicata, Rule 1; *Debile fundamentum fallit opus*; notes to Lamplugh: 301; Dovaston: 217; J'Anson: 91; PLEADINGS; PROCEDURE.

§ 27. *Consensus tollit errorem* is one of the great maxims of law. It expresses the idea that acquiescence in an act or proceeding will estop one from afterward raising it. *Allegans contraria non est audiendus*. It may be stated thus: that unless one objects promptly to any act or proceeding, if waivable in character, he condones it; this obviates the effect of that kind of error. Consequently one must be prompt—diligent—in stating objections and taking exceptions to waivable error—otherwise it is waived; and this is what is meant by the expressions: "He waived the point"; "He was guilty of neglect, of laches," in not objecting promptly and taking an exception. "He who does not speak when he should shall not be heard when he desires to speak." *Quod ad initio*.

Judge Miller contended, in *Cooper v. Reynolds*, that the owner of the land should have appealed and sought relief in a direct proceeding for the errors shown upon the record; and that failing to do so was laches, which operated to validate the sheriff's deed (*Voorhees v. Bank*: 119). In *Windsor*: 1 his view did not prevail, and Justice Field spoke for the court, which rendered one of its most notable decisions upon procedure.

It was contended in that case that the neglect—remissness—of McVeigh to take and file a bill of exceptions, and to seek a review upon such exceptions for error, was a waiver of the error. That error was shown in the common-law—mandatory—the formal—record, and this was held sufficient. Consequently there was no waiver. There it was held that such laches—neglect—would not condone the grave fundamental error shown upon that record.

§ 28. *Usurpation—abuse of power—need not be excepted to*—it cannot be waived when the mandatory record shows this. One may at once retire, and absent himself, nor speak nor act any further, but rely upon the defense of collateral attack.

Notes to Lamplugh: 301; Horan: 85; Shutte: 291; Windsor: 1.

Waiver.—

§ 29. *Acts speak as plainly as words.* Waiver may be evinced by conduct and need not be otherwise indicated.

Stevens, 173 Mass. 382, 73 Am. St. 300; note (waiver by conduct); *Qui tacet consentire videtur; Res ipsa loquitur; Non refert an quis*, etc. What is. Bliss, Pl. 53, n., 3d ed. *Allegans contraria*.

Failing to argue an error assigned abandons it. Atlantic; Kraner: 299. Failing to assign error abandons the statutory record; it is surplusage unless error is assigned upon that record. See ASSIGNMENT.

§ 30. *Waiver when once evinced or signified is operative and available, and like an election once made is final and irrevocable.* See *Ut res magis*, etc.

Fraud upon the court is a ground for applying waiver, e. g., if a defendant treats a document as an indictment, which is not such in fact, this is held a fraud on the court and is an estoppel. S. v. Cody (1896), 119 N. C. 908, 56 Am. St. 692, n. This is a new view of fraud, and to protect from such frauds the division of state power is abrogated. See MISSOURI: cases; *Coram judice*; Windsor: 1; THEORY; PRACTICAL CONSTRUCTION; USURPATION; Roden: 12b.

If one should demur, but fails to, he waives the right to plead such defense. 70 Am. St. 586.

Objections to a bill of exceptions cannot be waived and then afterward excepted to. Hoff, 101 Wis. 118, 70 Am. St. 903. See ABATEMENT.

Waiver if once signified, then further objection is unavailing. Kraner: 299. If one waives a summons, he cannot afterward object for want of it or to defects in making an appeal, or an appeal bond. See SUMMONS; ABATEMENT; *Verba nihili*, etc. Exceptions in a state court are essential to secure a review in the United States supreme court. Winona Case. However it is a general rule that fundamental rights cannot be waived.

§ 31. *A disinterested judge is a fundamental right.* Constitutions yield to that (Oakley: 222), as do acts of parliament (Dimes: 176). Omnipotent powers of man yield to fundamental law. *In presentia majoris*. When the laws of the Divinity are neglected, human laws cannot prosper.

Newcome, 58 Tex. 141, 44 Am. Rep. 604 (stating Oakley: 222 and Dimes: 176).

Waiver of constitutional rights and privileges. Kelly: 285; Bailey, Jurisdic. 57-76; Lampasas v. Bell (1901), 180 U. S. 276, 283. Citing Cool. Const. Lim. 196; Clark v. Kansas City (1900), 176 U. S. 114.

Jury trial; waiver of. See Schick v. U. S.; S. v. Croteau: 271; *Ad questionem facti*.

An unconstitutional judgment is voidable only. Koepke, 157 Ind. 172, 87 Am. St. 161-203, ext. n. Contra: Kelly: 285. See Turney v. Barr.

Waiver and acquiescence. Mews' E. C. L., wherein are noted general principles: Knowledge of rights; laches; lapse of time; notice, and duty to inquire; permitting expenditure (see ESTOPPEL), or the settlement or disposition of property;

Waiver.—

objection to jurisdiction; delay in prosecuting suit; tortious acts; voidable deeds; ratification of fraudulent transactions (*Omnis ratihabito*, etc.); waiver of time —when essence of contract; right of injunction, when barred (see EQUITY: INJUNCTION), waiver or discharge of lien.

Waiving tort and suing in assumption. Smith v. Hodson: 156; Jones v. Hear: cited, Bliss, Pl. 14, 154, 244. See ELECTION; *Allegans contraria*, etc.

Waiver must be alleged and proved. Assurance Co., 183 U. S. 308 (of conditions in insurance policy). Must also be pleaded. 9 Cyc. 727; Hotchkiss, 96 Va. 649, 43 L. R. A. 806; Trezona, 107 Ia. 22, 43 L. R. A. 136. Performance of conditions may be averred, and waiver may then be proved. See PERFORMANCE.

WALDEN v. BODLEY: L. C. 139.

WALKER v. TURNER: L. C. 118.

WALKERLY, *In re* (1895), 108 Cal. 627, 49 Am. St. 97-138, ext. n. (rule against perpetuities).

WALL v. TRUMBULL (1867), 16 Mich. 245; 10 Vt. 506; Ald. Jud. Writs. S. P. Blair: 170. Statutory powers must be strictly pursued.

WALTON v. SHELLEY (1786), 1 Term Rep. (D. & E.) 296; Brown, 94 U. S. 423; 1 Gr. Ev. 383; 2 Wigm. Ev. 529; *Nemo allegans suam*, etc. Cited, § 186a, Hughes' Proc.

WARMAKER v. WEAVER (1903), 176 N. Y. 75, 68 N. E. 135, 98 Am. St. 621-650 n., 65 L. R. A. 529-553, ext. n. (states Seaton v. Benedict, Montague v. Benedict, De Benham v. Mellon, Manby v. Scott and Jolly v. Rees).

Husband and wife; his liability for necessities furnished the wife while living with him. See HUSBAND AND WIFE.

WAR: 2 Bouv. 1208-1210; And Dic.

WARD v. TURNER: See GIFTS; § 66, Hughes' Conts. Gifts causa mortis. Johnson, 101 Va. 414, 99 Am. St. 884-918, ext. n.

WARFIELD v. LINDELL (1860), 30 Mo. 272, 77 Am. Dec. 614. Pleadings as evidence. Boileau: 43; Dinehart: 279. See ADMISSION.

WARMAN v. FIRST NATL BANK OF Akron (1900), 185 Ill. 60, 49 L. R. A. 412, n. An affidavit to a plea sufficient to put plaintiff to proof of execution of the instrument sued on, as provided by § 34 of the Practice Act, cannot be made by an agent of defendant. *Ita lex scripta est; Expressio unius*, etc. See Young v. McLeMore.

This case well illustrates technical and strict construction. See Hahl; Russell v. Shurtleff. Cf. Bates: 225.

WARMSTREY v. TANFIELD (LADY), (1629), 1 Chan. Rep. 29, 21 Eng. Reprint 498, 2 Lead. Eq. Cas. (Wh. & T.) 1530, 33 L. R. A. 280, 1 Pars. Conts. 234, 1 Pom. Eq. 148, 3 id. 1270, 1287, 2 Sto. 1040.

Assignments. Possibility assignable in equity. See Ryall v. Rowles: cases; 3 Pom. Eq. 1270-1291, Greenh. Pub. Pol. 420-441, 7 Encyc. Pl. & Fr. 732, 733. Wages to be earned are assignable. Mulhall, 1 Gray, 105, 61 Am. Dec. 414-417, n.; note to 94 Am. Dec. 649; Manly v. Bitzer (1891), 91 Ky. 596, 34 Am. St. 242, n.; Metcalf v. Kincaid (1893), 87 Iowa, 443, 43 Am. St. 391, n.; Field v. Mayor of New York. See Steinbach v. Brant (1900), 79 Minn. 383, 82 N. W. 651, 69 Am. St. 494; cases. Possibilities, expectancies, assignable. Skipper,

Warmstrey.—

42 Ala. 255, 94 Am. Dec. 646-651, ext. n.; McCall, 98 Ky. 166, 56 Am. St. 335-361, 33 L. R. A. 286, n., 288, ext. n.; Clendenning, 54 Kan. 523, 33 L. R. A. 278-288, ext. n. *Future property may be assigned.* Holroyd, 10 Hou. Lds. Cas. 191, Bisp. Eq. 165; Field v. Mayor: 84; *Assignatus utitur jure auctoris.* The product of a whaling expedition may be assigned. 2 Sto. Eq. 1040. *Officers cannot assign salaries.* Dickinson v. Johnson.

WARRANT: Requisites of warrants and writs. Ald. Writs, 201-211; White: 130. See SEARCH WARRANT; Bouv.; And. Dic.

Warrant of commitment must be sufficient. Ald. Jud. Writs, § 208; Burford, 3 Cranch, 451. Must be certain. § 152, Gr. & Rud.; C. v. Crotty, sub U. S. v. Holmes.

Warrantor; indemnitor; must depend on notice. Lovejoy: 239; And. Dic.

Sufficiency of, in prosecution for resistance of an officer. McClain, C. L. 922. See ARREST.

WARRANTY: In the laws of sales—contract. See *Caveat emptor*; Pasley: 375; Chandelor: 374; Schuchardt v. Alans, stating Chandelor; Hughes' Conts., § 99; 1 Beach, Conts. 244-296; DECERT. *Seller of commercial paper warrants it.* See *Caveat emptor*.

WARREN v. SLADE: L. C. 243.

WASTE: 2 Gr. Ev. 650-656; Garth v. Cotton; Bouv. Dic.

WATER; WATER RIGHTS: See *Aqua currit*, etc.; Chasemore v. Richards; Arkright v. Gell; Acton v. Blundell; Kansas v. Colo. (1907), 206 U. S. 46-118; *Qui prior est tempore*, etc.

Negligent use of. Fletcher v. Rylands. Liability of a municipal corporation for polluting. Winchell, 110 Wis. 101, 84 Am. St. 902, ext. n. Mizell, 129 N. C. 93, 85 Am. St. 705-735, ext. n. (of the right of one land owner to accelerate or diminish the flow of water to or from the lands of another).

One cannot wantonly divert subterranean flow from the beneficial use of another. Gagnon v. French Licks, 163 Ind. 687, 68 L. R. A. 175 (*Sic utere*).

Percolating water. Huber, 117 Wis. 355, 99 Am. St. 933. Chasemore; Katz, 141 Cal. 116, 99 Am. St. 35, 64 L. R. A. 236 (use limited to premises, in some cases); Barclay, 121 Ia. 619, 100 Am. St. 365, n.

Liability for damming back water of stream. Avery, 75 Vt. 235, 59 L. R. A. 817-906, ext. n.

Damages from surface water; Liability. Brown, 202 Pa. 297, 58 L. R. A. 321-333, ext. n. (freezing on street and causing damage). Surface water cannot be collected in artificial channels and discharged upon the property of an adjacent owner. Noyes, 29 Wash. 635, 92 Am. St. 937, n.

State and federal ownership of waters. Smith, 23 Mont. 65, 50 L. R. A. 737.

Right of prior appropriation. Crawford, 67 Neb. 325, 60 L. R. A. 889, n. Periodical appropriation of water. Cache La Poudre, etc. Co., 25 Colo. 161, 46 L. R. A. 175, n.

Prescriptive right to water. Oregon Construction, 41 Oreg. 209, 93 Am. St. 701-731, ext. n. *Aqua currit*, etc.; Acton (cutting off supply of spring); Arkright; Chasemore (percolating water). Right to dam a stream and to use of. Fisher, sub MALICIOUS ACTS, 92 Am. St. 77. See Katz

Water.—

case, *supra*, discussing Chasemore and Acton. *Cessante ratione*, etc.; *Sic utere*, etc.

Pollution of; Sic utere; Necessitas; Aqua currit. Eno Cotton Mills, 141 N. C. 615, 7 L. R. A. (N. S.) 321, 335, n.

Navigable, 29 Cyc. 205-374.

WATER COMPANIES: Their liability. Middlesex Co., 64 N. J. Law, 240, 81 Am. St. 467-495, ext. n.; Ukiah, 142 Cal. 173, 75 P. 773, 100 Am. St. 107.

WATERS, E. v.: L. C. 71.

WATERS v. BAIRD (1810), 6 Mass. 506. Ewell, Lead. Cas. Int. 761, 4 Am. Dec. 170, Greenh. Pub. Pol. 459, 1 Pars. Conts. 430, 1 Chit. 270, 2 Pom. Eq. 651, 2 Gr. Ev. 121, 302.

Duress. One cannot employ criminal process for civil purposes. City Nat. Bank v. Kusworm; Wolff, 95 Wis. 257, 60 Am. St. 115; Fay, 6 Wis. 42; Hackett, 6 Allen, 58, Cool. Torts. 190, 506, 1 Wat. Tres. 318, 347, 2 Beach, Conts. 394-401. See DURESS; Sasportas; Nullus commodum.

WATKINS v. S.: L. C. 269.

WAUGH v. CARVER (1793), 2 H. Bl. 235, Smith, Conts. 461, 2 Sm. Lead. Cas. 1316-1346; Lind. Part. 27, 40, Mews' E. C. L.; Pars. Part., Story, Lindley; 3 Kent, 25, 28, 33, Sto. Ag., Whart., Pars. Conts., 2 Page, 940, Bro. Max. 827; 34 Fla. 645, 43 Am. St. 223.

Cited, § 311, Hughes' Proc.; § 298, Gr. & Rud.

Cox v. Hickman (1860), 8 H. Lds. Cas. 268, 11 Eng. Reprint, 431; cases; 9 C. B. (N. S.) 847 (99 E. C. L. R.); Mews' E. C. L.; Waverly Bank, 150 Pa. 466, 30 Am. St. 823, n. Lind. Part. 30, 31, 3 Kent, 25, Bates, Pars.; Pars. Conts., Blish, Chit., 1 Add. 98, 2 Gr. Ev. 482. §§ 139, 305, Hughes' Proc.

Participation in profits not conclusive evidence of partnership. Waugh; Webster, 34 Fla. 637, 27 L. R. A. 126, 43 Am. St. 217-232, ext. n., citing Waugh and Cox. *Torts; Liability of each partner for.* Williams, 115 Ala. 277, 67 Am. St. 32-51, ext. n.

Partnership. How far sharing in the profits is evidence of partnership. Waugh; *Res ipsa loquitur*; Green, 98 Ky. 330, 56 Am. St. 375, n. (holding out); Livingston v. Roosevelt: 345 (partners are agents for each other); 2 Rand. Com. Paper, 1014, 1 Danl. Nego. Insts. 488, 1 Pars. N., Pars. Conts., Chit., Sto. Part., Lind., Pars.; Baxter v. Rollins (1894), 90 Ia. 217, 48 Am. St. 432-442, n.; Kerper v. Wood (1891), 48 Ohio, 613, 15 L. R. A. 656-661, n., 6 Am. Dec. 574-576 (power after dissolution); Gilmore, 142 N. Y. 1, 40 Am. St. 554; Williams (1896), 115 Ala. 277, 67 Am. St. 32-51, ext. n.

Jurisdiction over suits between partners is in equity, to avoid circuitry and a multiplicity of suits. Bro. Max. 346, Sto. Part. 325; Beede, 66 Vt. 114, 44 Am. St. 824, n., 2 Beach, Eq. 873-882, n., Adams, Eq. 239-247, 2 Gr. Ev. 477-486, 3 Kent, 24-69.

Dissolution; what are grounds for. Breaux, 50 La. Ann. 228, 69 Am. St. 403-436, ext. n. Notice of dissolution. See *Allegans*, etc.; notes to 26 Am. Dec. 290-293.

Mining partnership. Taylor v. Castle. *Partnership after death.* Brew, 196 Pa. 222, 46 Atl. 257, 79 Am. St. 706-716, ext. n. Each partner is an agent for the other. Cox.

WAY: 2 Gr. Ev. 657-665, 2 Blish. Cr. Proc. 1042-1057. *Of necessity.* § 147, Hughes' Conts.; Pinnington.

Way.—

One selling a tract of land entirely surrounded by what he still retains must give a right of way for the use of the part sold. It would be absurd to assume that he did not so intend.

WEAPON: And. Dic.; McClain, C. L. (deadly). Nature of as indicating intent. McClain, C. L. 123, Bouv. Dic.

WEAVER v. TONY: L.C. 67.

WEBB v. JOHN HANCOCK MUT. INS. Co. (1904), 162 Ind. 616, 69 N. E. 1006 (instructive case). *Constructive notice; doctrines of.* One is charged with what public records show.

Ignorantia legis neminem excusat. One must take notice of facts and circumstances within his knowledge or shown from public records. *Equitable estoppel must be pleaded.* Wright: 28.

Every one is bound to know the law. What cannot be done directly cannot be done indirectly. Graham. Cited, § 23, Hughes' Proc.

WEBB v. FLUMMER: Wigglesworth: 399.

WEBER v. HARTMAN (1883), 7 Colo. 13. Abuse of powers makes an officer a trespasser *ab initio*. Six Carpenters: 165.

WEBSTER'S CASE (C. v. WEBSTER): See REASONABLE DOUBT, sub Bonnell: 185.

WEEMS' (OR BEEMS') RECEIVER v. Masterson (1891), 80 Tex. 45-56.

Pleadings do not confer jurisdiction. They may be waived. See Windsor: 1; Fish v. Cleland: 12; Rushton: 5. "A proposition that a judgment of a district court could be attacked in a collateral proceeding because pleadings were defective, if the court had jurisdiction of the subject-matter and the parties, would not be advanced, and it would be readily conceded that, however erroneous such judgment might be, it would be conclusive on the parties until set aside by some direct proceeding for that purpose; and we are of opinion that this would be true even if the pleadings were so defective as to be bad on general demurrer, or as to present no issue of fact." 80 Tex. 55. O'Brien v. P. (1905), 216 Ill. 354, 364, 108 Am. St. 219. See 67 C. L. J. 393.

This case holds that a pleading bad on general demurrer is aided by pleading over; that if from the judgment the court could or might have entered it, had proper pleadings been filed, the judgment was valid if there was only jurisdiction over the person. It denies that pleadings are the juridical means of investing a court with jurisdiction of a subject-matter to adjudicate it. See *De non apparentibus; Frustra probatur quod probatum non relevat; Verba fortius accipiuntur contra proferentem*; U. S. v. Cruikshank: 232.

WEET v. BROCKPORT: Hill v. Boston. Cited, § 306, Hughes' Proc.

WEIGHT OF EVIDENCE: Bonnell: 185; Bouv. Dic.

WELBORN v. WEAVER: L.C. 388.

WELTNER v. BISHOP: L.C. 268a.

WEST v. SMALLWOOD (1838), 3 Mees. & W. 418, Bigl. L. C. Torts, 237 (false imprisonment; jurisdiction essential for protection of officer and party).

Liability of a complainant for prosecuting suits. West; Everett, 146 Mass. 89, 4 Am. St. 284, n.; Gifford, 50 Minn. 401, 18 L. R. A. 356, n.; Cool. Torts. 648,

West v. Smallwood.—

Blsh. 211, Moak, Underh. 174, 187, Add., 1 Wat. Tres. 305, 306, Shear. Neg. 159; Sutherland, 63 Mich. 620, 6 Am. St. 332, n. (*bona fide* complainant is not liable for the lawlessness of officers, unless he made himself a joint trespasser); Boeger, 97 Mo. 390, 10 Am. St. 322, n.; Wyatt, 5 H. & N. 371; Barker, 7 Gray, 53, 66 Am. Dec. 457, 14 L. R. A. 356: cases.

Party making complaint to justice, bona fide, not liable, if the justice acts without jurisdiction. Brown v. Chapman (1848), 6 C. B. 365, stated, 1 Wat. Tres. 306, Bro. Max. 124, 2 Add. Torts, 835, 867, 1032, Blsh. 211; Rush, 100 Me. 322, 70 L. R. A. 464.

WESTFALL v. FRESTON (1872), 49 N. Y. 349, 1 Desty, Tax. 607. Assessments must be in apt time. **MAGNA CHARTA:** Fletcher: 18; Thames; Cardigan, sub Piper: 114. See TAXATION.

WHARFAGE: Rights to. Davidson, 122 Fed. 1006, 70 L. R. A. 193-209: cases.

WHATMAN v. PEARSON: Sub Hillard.

WHAT OUGHT TO BE OF RECORD must be proved by record and by the right record. See *Expressio unius; Campbell: 2, et seq.; MANDATORY RECORD; § 104, 119, Vol. I., Gr. & Rud.*

This rule is the fourteenth conserving principle. § 104, also §§ 110-123, Gr. & Rud.

Cited, §§ 1-21, 24, 36, 44, 45, 142, 188, 245, 304, Hughes' Proc.; Iverslie: 46.

Cited, §§ 19, 25, 26, 33, 40, 43, 56-61, 88-89, 115, 123, 124-125, 136, 144, 165, 180, 182, 198, 210, 221, 245-249, 265, 269, 270a, 272, 278, 297, Gr. & Rud.

WHEADON v. OLDS: L.C. 349.

WHITCOMB v. WHITING: LIMITATIONS.

WHITE v. BLUETT: L.C. 317.

WHITE v. CORLIES: L.C. 303.

WHITE v. COUNTY: Sub Hill v. Boston.

WHITE v. FORT: L.C. 175.

WHITE v. LYONS: L.C. 140.

WHITE v. WAGAR: L.C. 130.

WHITEHOUSE v. FELLOWS (1861), 10 C. B. (N. S.) 765 (100 E. C. L. R.), stated in *Hill v. Boston*, 1 Thomp. Neg. q. v., Whart. Neg., 1 Add. Torts, 1043, Moak, 65, 6 Colo. Ap. 347, 348, Shear. Neg., Wood, Nuis., 2 Dill. Corp. 987-990.

Whitehouse stated: Trustees of a township were sued in their quasi-corporate capacity for negligence in the manner in which they had caused drains or catch-pits to be made, by reason of which overflow waters upon a highway were turned upon the plaintiff's lands and (as in *Fearney v. Smith*, post) flooded his colliery. He sued for this damage. *Held:* He could recover.

Duncan, 6 Clark & Fin. 894, 7 Eng. Reprint, 934. See these cases cited and discussed in *Mersey Docks*; Rochester (flooding a manufactory by negligent construction of a drain); Aug. Wate. 108, et seq. See also *Hill v. Boston*; Sutton. *Fearney v. Smith* (1877), 86 Ill. 391: cases, S. P. as in *Whitehouse*. *Sic utere*, etc., applies to governmental agencies as well as to individuals. Bailey v. Mayor; Sutton; Jones v. Bird (1822), 5 Barn. & Adol. 857 (7 E. C. L. R.), 1 Dowl. & Ry. 497, 1 Thomp. Neg., Shear. Neg., Woods, Nuis. (constructing a sewer authorized by statute, *bona fide*, and to the best of one's skill and judgment, is no

Whitehouse.—

defense). See Bro. Max. 394, citing *Vaughn v. Taff R. R.* (statute may exempt a railway from liability for fires by locomotive).

Nuisance; no prescriptive rights to. Each injury is a distinct cause of action. *Whitehouse v. Wells*, 151 Mass. 46, 1 Am. R. R. & Corp. Rep. 703-724, ext. n., 21 Am. St. 423, n.; *Schlitz Brewing Co.*, 142 Ill. 511, 34 Am. St. 92-99, 13 L. R. A. 390.

Successive actions may be maintained for each injury, within the statutory period, after its occurrence. *Whitehouse v. Wells*; *St. Louis R. R.*, 52 Ark. 240, 6 L. R. A. 804, n.; *Valparaiso*, 12 Ind. Ap. 250, 54 Am. St. 522, n.; *Indiana*, Ill. & Ia. R. 59 Ill. Ap. 251.

Damages after commencement of suit; when recoverable. *Schlitz Brewing Co.*, *supra*. Not allowed in nuisance. 1 Sedgk. Dam. 84-95; 1 *Suth. Dam.* 199-202.

Trespass to realty; damages for may be recovered after commencement of suit and down to verdict. *Schlitz Brewing Co.*, *supra*.

Supplemental bill may be filed showing a continuation of the same trespass. *S. v. Black River Phosphate Co.* (1893), 32 Fla. 82, 21 L. R. A. 189. *Interest re-publica*, etc. See **MULTIPLICITY OF SUITS**. There can be but one recovery; damages subsequent to suit attach at an incident, and must be so recovered. 1 Sedgk. Dam. 84, 85, 1 *Suth. Dam.* 113.

WILLOW v. NASHVILLE R. R. (1904), 114 Tenn. 344, 68 L. R. A. 503, n.

Comity of courts; transitory causes of action; penal statutes are domestic. A statute giving a right of recovery to representatives of one killed by negligence is not penal; it is a remedial statute and as such may be enforced in sister states having similar statutes. *Actio personarum*, etc., cited and discussed. *The Harrisburg* (1886), 119 U. S. 199; *Huntington v. Attrill*, 146 U. S. 683; *Raisor v. C. & A. R. R.* (1905), 215 Ill. 47, 74 N. E. 69, 106 Am. St. 153-159 (such statutes are penal); 70 S. C. 254, 106 Am. St. 746.

Penal statutes and crimes are domestic. *P. v. Caesar*.

WHITNEY v. CHICAGO R. R.; L. C. 112. **WHITNEY v. DICK** (1906), 202 U. S. 130-141.

The circuit court of appeals cannot issue a writ of habeas corpus unless it be necessary to enforce a principal matter of which it has jurisdiction. It has jurisdiction only where at least \$1,000.00 is involved. *Expressio unius*.

Certiorari will only be exercised where there is no usual or ordinary method of review by appeal or error.

WHITWORTH v. THOMAS (1887), 83 Ala. 308, 3 Am. St. 725-746, ext. n., 3 S. R. 781, *Mech. Sales*, 932-935, *Whart. Conts.* 232a, 283. §§ 122, 154, 299, 326, 333, *Hughes' Proc.*

Ex turpi causa non oritur actio. Recriminatory fraud as a defense. *In pari delicto*, etc. See *Id.*; *Holman*; 363; *Brooks*, sub **CONTRACTS** (parties must be *in pari delicto*); *In pari delicto*, etc.

Where the seller of a horse represents him to be sound, knowing him to be unsound, and thereby misleads the purchaser, who is unable to discover the defect by ordinary observation, he perpetrates a fraud which will entitle the purchaser to rescind on demand made within a reasonable time after the discovery of the fraud.

Whitworth.—

In action for rescission of contract for exchange of horses on the ground of defendant's fraud, the defendant cannot set up the fraud of the plaintiff as a defense.

Rescission of contracts generally. See notes to *Johnson*, 8 Gill, 155, 50 Am. Dec. 669-681, n.; *Bryant*, 13 Gray, 607, 74 Am. Dec. 655-662.

Effect of fraud or concealment in sale. *Hughes*, 1 T. B. Monroe, 215, 15 Am. Dec. 106-108, n.; *Barnard*, 38 Mo. 170, 90 Am. Dec. 416-431, n. See *Caveat emptor*; *Van Houten*.

WIEBOLD v. HERMAN; L. C. 98.

WIELAND v. POTTER (1895), 5 Colo. App. 45.

WIFE: MARRIED WOMEN; HUSBAND.

WIGGLESWORTH v. DALLISON; L. C. 399.

WIGHTMAN v. COATES (1818), 15 Mass. 1, 8 Am. Dec. 77, *Pars. Conts.* 66, *Ans.* 72, 1 *Chit.* 22, 789, 790, *Smith*, 194; 3 *Suth. Dam.* 984. **Marriage contracts;** ground for rescission. *Van Houten v. Morse*. Mutual promises are a consideration. *Smith*, *Conts.* 194. See **MARRIAGE CONTRACTS**.

WILKERSON v. UTAH; L. C. 221.

WILKINS v. NORMAN (1905), 139 N. C. 40, 51 S. E. 797, 111 Am. St. 767-777, ext. n.

Deeds; repugnant clauses in; when a last clause is void. *Heaton*; *Horne*; *Ut res magis*.

Verba fortius. The grant of a freehold estate will not be limited by restrictive language in the *habendum*. *Carl Lee v. Ellsbery* (1907), 82 Ark. 209, 118 Am. St. 60; cases.

The first deed and the last will shall operate.

WILLIAMS v. BAKEHEAD; L. C. 93.

WILLIAMS v. BAYLEY; *Sub Sasportas*.

WILLIAMS v. CARWARDINE; L. C. 322.

WILLIAMS v. CHICAGO R. R. (1891), 135 Ill. 491, 25 Am. St. 397, 11 L. R. A. 352. *Ad ea que frequentius*, etc.; *Verba intentione debent inservire*; *Russell v. Shurtleff*; *Osgood*. §§ 295, 296, *Hughes' Proc.*

Intent of statute controls.

WILLIAMS v. EGGLESTON; L. C. 94.

WILLIAMS v. ESLING (1846), 4 Barr (Pa.), 486, 45 Am. Dec. 710, *Bigl. L. C. Torts*, 311, *Bish.* 30, *Cool.* 68, *Ang. Waterc.* 423, *Moak*, 350-368, 1 *Suth. Dam.* 11, § 328, *Hughes' Proc.*; § 296, *Gr. & Rud.*

Trespass; entry upon land; damage. An action lies for a trespass upon a right of way without proof of actual damage. *Williams v. Esling*. A balloon descending on one's land is actionable. *Guille*. Use or abuse of another's realty is actionable. *Bish. Torts*, 819-825; 2 *Wat. Tres.* 778-890; *Hay* (right to undisturbed possession); *Chandler*, 21 N. H. 282 (trespass upon land; injury to possession).

Entering to get one's own goods is nevertheless a trespass. *Anthony*, 8 Bing. 188 (21 E. C. L. R.) 1 M. & Scott, 300, *Bigl. L. C. Torts*, 374-387, *Ames*, *Cas.*, 159, *Cool.* 54, 55, 2 *Wat. Tres.* 781, 804; *Cutler*, 57 Ill. 252; *Bro. Max.* 304; *McLeod*, 105 Mass. 403, 7 Am. Rep. 539. See 1 *Add. Torts*, 375.

Entry of a dwelling without a license is a trespass. *Adams*, 12 Johns. (N. Y.) 408, 7 Am. Dec. 327, *Sedgk. Dam.* 193; *Cutler*, 57 Ill. 252. See *Semayne's Case*; cases, etc.; *Domus sua cuique*.

WILLIAMS v. HINGHAM CO.; L. C. 7.

WILLIAMS v. PEYTON; L. C. 116.

WILLIAMS v. STOLL (1881), 79 Ind. 80, 41 Am. Rep. 604-611: cases. *Cited*, Hughes, *Conts.* § 227, Hughes' *Proc.*; § 296, Gr. & Rud.

Williams stated: *Negligence in executing; mistake.* Deception by payee is no defense against innocent holder of commercial paper. A *bona fide* purchaser is protected against everything but forgery (Swift), and contracts made void by statute. Union Trust Co. v. Preston. One who, being unable to read or write English, signed and delivered a promissory note in English, fraudulently represented to him to be a different paper, nevertheless is liable thereon to an innocent purchaser, if he fails to require one of his sons, present at the time and able to read English, to read the instrument to him before he signed it.

Ewart, Estoppel, 98-121 (negligence sometimes an element of estoppel); Van Beek, 118 Wis. 42; Bostwick, 116 Wis. 392, 400, 442 (*Vigilantibus*, etc.). *See* Brown: 347; Wheadon v. Olds; 1 Danl. Nego. Insts. 847-849; Roach v. Karr (1877), 18 Kan. 529, 26 Am. Rep. 788, Ewart, Estoppel, 436; 3 Kent, 79; Thorogood's Case, 2 Co. 9b, Ans. *Conts.* (Knowlton's ed.) 124; Wilcox, 176 N. Y. 115, 98 Am. St. 650; Whart. *Conts.* 196, *Laws.* 212.

Deception of ignorant and illiterate person sometimes avoids a contract. 1 Danl. Nego. Insts. 847-849; Maxfield, 45 Minn. 150, 10 L. R. A. 606, n.; Miller, 119 Ind. 79, 4 L. R. A. 483, n.; Ewart, Estop. 426-472; Page, *Conts.* 64.

Writing signed without reading is binding. Albrecht, 87 Wis. 105, 41 Am. St. 30, n.; Yakima, 37 Wash. 566, 107 Am. St. 823, n.; Spitzze, 75 Md. 162, 32 Am. St. 378-388, ext. n. *Signing a contract without fairly understanding it.* Och, 130 Mo. 27, 36 L. R. A. 442, n.; Standard, 121 Wis. 14, 105 Am. St. 1016-1027; R. R. v. Hamler, 215 Ill. 525, 106 Am. St. 525. *See* EQUITABLE ESTOPPEL; Lickbarrow: 394.

Language used binds. The intention of the parties is primarily to be determined from the language used by them. A mistake of law does not constitute a valid objection. Parties cannot be heard to complain that they did not contemplate the legal effect of the language which they had deliberately chosen. Hunt v. Rousmanier; Holmes, 8 Mich. 66, 77 Am. Dec. 444, Bish. *Conts.* 381; Mech. Ag. 296; *Laws.* *Conts.* 206; *Expressio unius*, etc. Public policy requires the enforcement of the above rule. *Salus populi suprema lex; Ignorantia legis neminem excusat*; 1 Sto. Eq. 111; 2 Pom. 841-843.

One is presumed to intend the natural, direct and probable consequences of his act. Squib Case; Young v. Grote.

Reality of consent is essential for a contract, and if one was wholly imposed upon and without his fault or negligence, as if a contract were written above his signature, not written for the purpose of signing a contract, then this avoids the contract as if it were a forgery.

Walker, 29 Wis. 194, 9 Am. Rep. 548, Huff. *Conts.* 238; Beck Co., 104 Ala. 503, 53 Am. St. 77, n. *See* Swift; Young; Hunt; Ans. *Conts.* 124; *Laws.* *Conts.* 212.

Negligent error does not excuse. Whart. *Conts.* 196; Thorogood's Case, 1 Co. 435, Part II, 5b; 1 Page, *Conts.* 75.

A mistake concerning the nature of the

Williams v. Stoll.—

transaction will excuse. McGinn v. Tobey (1886), 82 Mich. 252, 4 Am. St. 848, *Laws.* *Conts.* 212 (mistake in executing contracts); Foster v. McKinnon (1867), L. R., 4 C. P. 704, *Laws.* *Conts.* 212; Yakima, 37 Wash. 566, 1 L. R. A. (N. S.) 1075-1079, ext. n. (by trick).

Presumption that signer read. Fivey v. Penna. R. R. (1902), 67 N. J. Law, 627, 91 Am. St. 445, n.

WILLIAMSON v. BERRY: L.C. 65.

WILLIAMSON v. BROWN (1857), 15 N. Y. 354-365: cases. *Cited*, Dev. Deeds, 2 Pom. Eq., Wade, Notice, 1 Beach, Eq.; Phelan v. Brady (1890), 119 N. Y. 587, 8 L. R. A. 211 (instructive case); Warv. Vendors; Pom. Rem.; 1 Jones, Mort. 544, 547; Pyles, 189 Pa. 164, 69 Am. St. 794; Dembitz, R. P.

Cited, §§ 117, 180, 326, 329, Hughes' *Proc.*; § 289, Gr. & Rud.

Possession of real estate is notice of occupant's rights. *Pro possessione*; Williamson v. Brown; Le Neve: 396; Bassett: 395; Asher, 35 L. J. Q. B. 17; 11 Rul. Cas. 542, n., 1 Beach, *Conts.* 354; 2 Wh. Ev. 1331; Coffee, 15 Colo. 184, 10 L. R. A. 661; Tate, 37 Fla. 439, 53 Am. St. 251, n.; Carr v. Brennan (1897), 166 Ill. 108, 57 Am. St. 119, n.; Hicks, 207 Pa. 570, 65 L. R. A. 209 (notice from gas derrick); Mullins, 25 Mont. 525, 65 Pac. 1004, 87 Am. St. 430 (notice from rescission; *bona fide* purchaser); Webb v. John Co. Persons dealing with property are charged with constructive notice.

Possession is presumed lawful. 2 Best, Ev. 350, 1 Beach, Eq. 366, Sto. 761; *Nemo presumitur malus*; Armory: 180. Occupancy is the mother of all title. 2 Kent, 319, 2 Wash. R. P. 447; Coffee. *See* LIMITATIONS.

In the above we see immense fields of evidence that are usually classed as real-estate law. But the rationale is equally applicable in all relations.

WILLISON v. WATKINS (1830), 3 Pet. (U. S.) 43, 7 L. ed. 596, n., Bigl. Estop. 534, 1 Chit. *Conts.* 462, 507; Wash. Real Prop., q. v.; Horner v. Leeds. *Cited*, § 185, Hughes' *Proc.*

Landlord and tenant. A tenant and one holding under him cannot dispute the landlord's title. *Allegans contraria*, etc. 2 Sm. Lead. Cas. 902-912, 8th ed.; Doe d. Knight v. Smythe (1815), 4 Maule & S. 347-349, 16 R. R. 486, 11 Rul. Cas. 73-77: cases, n.; Cooke v. Orley (1790); 5 Term Rep. (D. & E.) 4, 2 R. R. 521, 15 Rul. Cas. 297; Delaney v. Fox (1857), 2 C. B. (N. S.) 768, 15 Rul. Cas. 299; Emerick, 9 Grat. (Va.) 220, 58 Am. Dec. 217; Camp, 5 Conn. 291, 13 Am. Dec. 60-72, n.; Walden; Sedgk. & Walt, Trl. Off. Tit. 346-371; Fugh v. Davis (1893), 103 Ala. 316, 49 Am. St. 30, n.

Landlord and tenant generally. 4 Kent, 86-120; 3 Suth. Dam. 841-876; 1 Wash. R. P. 433-577, 4th ed., 15 Rul. Cas. 297-311. *See* LANDLORD AND TENANT.

Tenant cannot assign and release himself from payment of rent because of privy. Boston Ice Co.: 320; Washington Co., 123 Pa. 576, 10 Am. St. 553-565, ext. n.; Grommes, 147 Ill. 634, n., 4 Kent, 96, n.; Sexton v. Chicago Storage Co.

Lease. 15 Rul. Cas. 299-311: cases; 12 Am. & Eng. Encyc. Law, 974; Dumpor's Case (forfeiture of). *Notice to tenant.* Wade on Notice, 578-650, 4 Kent, 114, n. *Tenant and remainderman; relations.* Allen v. De Groodt (1889), 98 Mo. 159, 14 Am. St. 626-639, ext. n.

Willison v. Watkins.—

Estoppel of a tenant to deny his landlord's title. Davis, 130 Ala. 530, 30 So. 488, 89 Am. St. 55-115, ext. n.

Right of tenant to acquire title not inconsistent with landlord's at commencement. Smith, 62 Kan. 318, 53 L. R. A. 934-952, ext. n.

WILLS: 2 Bouv. 1229-1236; And. Dic.; 2 Gr. Ev. 660-695; 4 Kent. 502-544.

Nuncupative. 2 Bouv. Dic. 528; Estate of Grossman (1898), 175 Ill. 425, 67 Am. St. 279, n.; Wiley's Estate (1898), 187 Pa. 82, 67 Am. St. 569-579, ext. n.

Testamentary capacity. Converse v. Id. (1849), 21 Vt. 168, 52 Am. Dec. 58, Redf. L. C. Wills, 171, Ewell, Lead. Cas. Inf. 652, n., 1 Pars. Conts. 426, Bish. 961, Bigl. Fraud, 121, 2 Gr. Ev. 688; Henry, 106 Ala. 84, 54 Am. St. 22, n.; Molton; 413; U. S. v. Drew; Owen, 2. Ill. 380, 119 Am. St. 442-468.

Revocation of wills. Lawrason v. Morrison (1782), 2 Dall. 286, 2 Am. Lead. Cas. 482-545, ext. n., 1 Am. Dec. 288; Graves, 2 D. Chipp. 71, 15 Am. Dec. 653; Graham, 47 Minn. 171, 28 Am. St. 339-362, ext. n.; Giddings, 65 Conn. 148, 48 Am. St. 192-202, n.; Cheever, 106 Mich. 390, 37 L. R. A. 561-580, ext. n.

Construction; form of, immaterial. Gaston, 188 Pa. 374, 68 Am. St. 874 (instructive case); Boston Safe Deposit Co., 152 Mass. 95, 8 L. R. A. 740, n.

Heir may contract away his right to inherit. Brands, 44 N. J. Eq. 545, 6 Am. St. 909.

Gifts to a class, such as "children"; who are entitled to take. Thomas, 149 Mo. 426, 73 Am. St. 405-440, ext. n.; 15 Am. St. 592-595; 46 Am. Dec. 666, 669; 94 Am. Dec. 156, 157.

Perpetuities. Johnson's Estate (1898), 185 Pa. 179, 64 Am. St. 621-646, ext. n. *Statutes against.* 90 Am. Dec. 88-106, ext. n., 27 Am. St. 599-611, n., 15 L. R. A. 606; Thellusson v. Woodford. *Descent:* rules of. 9 Rul. Cas. 287-306; cases, n.; Mullett.

Fraud in obtaining will. Bigl. Fraud, 120-128. See **UNDUE INFLUENCE**; Huguenin v. Baseley.

Lost wills; probate of. Williams, 68 Neb. 463, 110 Am. St. 431-477, ext. n.

Attestation; witness to prove. Thompson v. Owen, 174 Ill. 229, 45 L. R. A. 682.

Practice relating to. Lane, 125 Ga. 386, 114 Am. St. 207-239, ext. n.

Form of a sufficient will. Scott, 107 Iowa, 723, 70 Am. St. 228, n.; Richardson (1892), 94 Cal. 63, 15 L. R. A. 635 (statute must be complied with); Walker (1895), 110 Cal. 387, 52 Am. St. 104; Lane's Appeal (1889), 57 Conn. 186, 4 L. R. A. 45, n. *Signature;* mark sufficient. Scott v. Hawk, *supra*.

Pretermitted heirs in wills; omitted heirs. Brown, 71 Neb. 200, 115 Am. St. 568-590, ext. n.

Statutory regulations of, are mandatory. Bro. Max. 706; Walls v. Walls, *sub Coram judice*.

Subscribing witnesses to. Stevens v. Leonard (1900), 154 Ind. 67-82, ext. n.

Republication of revoked wills. Stickney, 161 N. Y. 42, 76 Am. St. 246-262, ext. n.

What constitutes a will; form immaterial. Ferris, 127 Mich. 444, 86 N. W. 960, 99 Am. St. 480-500, ext. n.

Effect of delay in probating. Reid, 112 Ky. 810, 57 L. R. A. 253-266, ext. n.

Declarations of testator to affect. Colberts, 31 Mont. 461, 107 Am. St. 439-473, ext. n.

WILSON v. BRETT: L.C. 351.

WILSON v. FREEMAN (1904), 29 Mont. 470, 68 L. R. A. 833-848, ext. n. *Re-location of mining claim as abandoned or forfeited.*

WILSON v. LOWENTHAL (1899), 181 Ill. 170. *Cited,* § 126, Gr. & Rud.

WILSON v. S. (1896), 62 Ark. 497, 54 Am. St. 303, n. Venue need not be proved beyond a reasonable doubt in a criminal case. Bonnell: 185; 1 Bish. Crim. Proc. 383.

WILSON v. U. S.: L.C. 154.

WINDHAM v. CHETWYND (1757), 1 Burr. 414 (Statute of frauds). *Cited,* § 145, Hughes' Proc.

WINDSOR v. McVEIGH: L.C. 1.

WING v. MILL (1817), 1 B. & Ald. 104 (4 E. C. L. R.), 10 Mews' E. C. L. 1231. *See* Bartholomew: 302. *Cited,* § 72, Hughes' Conts.

WINONA, ETC. LAND CO. v. S. (1895), 159 U. S. 540, 40 L. ed. 252; cases.

Cited, §§ 11, 12, 78, 175, Hughes' Proc.; §§ 93, 119, 268, Gr. & Rud.

"Due process of law." A review for a federal question in the supreme court of the United States depends on notice to the state court of intention to seek for it. Therefore, unless objection is aptly made and exception is promptly shown, the right to such review is waived.

Consensus tollit errorem; 204 U. S. 458; Osborn v. Clark, 204 U. S. 565. *See* **WAIVER**; 196 U. S. 78, 192; L.C. 2906-296; Windsor: 1.

One may condone the deprivation of "due process of law" in a state court. *Winona Case*; Loeber, 149 U. S. 580, 37 L. ed. 856; Leeper, 139 U. S. 462; Bobb, 155 U. S. 416; S. v. Schuman (1899), 36 Oreg. 16, 78 Am. St. 754; Lamar Canal Co., 26 Colo. 370, 77 Am. St. 261; Howard v. Fleming (record must present the question; it will not be assumed); Montgomery: 292; *De non; Verba fortius.*

Motion for rehearing will not raise, unless the court expressly passed upon the federal question. Disconto, 208 U. S. 570.

And the record only can show the question. Cornell v. Green (1896), 163 U. S. 75. Iversile: 46. *See* **MANDATORY RECORD.**

Issues raising the question must clearly be deducible from the record. Louisville, etc. R. R. v. Louisville (1897), 166 U. S. 709, 41 L. ed. 1178; Oxley Stave Co. v. Butler Co. (1897), 166 U. S. 749, 41 L. ed. 1149; Turnpike Co. v. Sandford (1896), 164 U. S. 578; Furman: 147a.

General statements or statement of conclusions insufficient. Clarke v. McDade (1897), 165 U. S. 168, 41 L. ed. 673; Insurance Co.: 157; L.C. 122-123.

Only the pleadings, findings and judgment will be looked to for a federal question. This excludes the statutory record. *See* **DUE PROCESS OF LAW RECORD.** Furman: 147a; *Expressio unius.*

Taxation; legislature has plenary power. Statute may authorize property omitted from taxation to be assessed at any time. *Winona Case.* And such rule may be made to apply to real property only, and not to personality; the latter may be exempt. *Winona Case.* And others than the assessor may assess. *Winona Case.* But see P. v. Hastings: 144.

Due process of law requirements are satisfied if only an opportunity to be heard is given. *Winona Case.* *Audi alteram partem.* Hurtado Case: 220. *See* Howard v. Fleming (state court's findings as to a crime and sufficient allegations are conclusive); Felts v. Murphy; Howard v. Ky.; Ky. v. Powers; Londoner, 210 U. S. 373.

Winona.—

A federal question must arise from the pleadings. *Sanborn*: 61. The opinion of a state court will not affect the facts arising from the pleadings. *Covington Co. v. Sandford* (1896), 164 U. S. 578, 580; *Howard v. Fleming*, *supra*.
WINSMORE v. GREENBANK: *Sub Ashby*; 273.

WINTERBOTTOM v. WRIGHT (1842), 10 M. & W. 109, 62 R. R. 534; *stated*, *Mews' E. C. L.*; *Gilson*, 36 Am. St. 813, 46 L. R. A. 33-122; 128 Mich. 654, 92 Am. St. 497, 559; *Young*, 185 Mo. 634, 662; *Van Winkle*, 52 N. J. L. 249, 19 Atl. 472; *Blish*, *Torts*, *Kinkead* (relation of tort and contract), *Pollock*, *Hale*, *Jaggard*, §§ 22, 334, 343, 347, 348, *Hughes' Proc.*

Winterbottom stated: Liability of a lessor or hirer of a thing which injures a third person. *Wright* hired to the postmaster-general a coach to carry the mail on a route. *Atkinson & Co.*, contractors, furnished horses for the coach and they hired *Winterbottom* as a coachman to drive. While driving, the coach broke down from latent defects and injured *W.*, the driver. For this he sued *Wright*, but failed to recover upon the ground of remoteness. His warranty to the postmaster-general did not extend to the driver.

See *Heaven*; *Langridge*; *Galbraith*; *Gilson*; *Thomas v. Winchester*; *Griffin*, 128 Mich. 653, 92 Am. St. 498-559, ext. n. (liability to third persons of lessors of real and personal property); 46 L. R. A. 108; 36 Am. St. 813; *Nelson*; *In jure*; *Coggs*: 350.

Liability of landlord. *Cleves*: 383; *Todd*; *Nelson*.

This case forcibly illustrates the relation of tort and contract, and that where there is no duty owing there is no actionable negligence.

WISCONSIN: Adopted the code in 1856. Its courts have most clearly and uniformly viewed its genius. The allegation is essential. *Kewaunee*: 29. The answer cannot be waived. *Borkenhagen*: 81; *Saunderson*. What ought to be of record must be proved thereby. *Iverslie*: 46. The general denial is viewed as obnoxious to a code; it cannot avail against a specific admission. *Dickson*: 34; cases. Pleadings are to limit issues and to narrow proofs, for the due administration of justice, and courts have inherent power to construe accordingly. *Kollock v. Scribner*. Fraud vitiates an adjudication. *Crowns v. Forest Co.* A cause of action cannot be repeated in fictitious statements, except when a necessity therefor appears. *Whitney v. R.*

Frustra probatur quod probatum non relevat is strictly enforced. *Borkenhagen* and *Saunderson Cases*, *supra*; *Paulsen v. S.* (1903), 118 Wis. 89. *See RELEVANCY OF EVIDENCE*. The doctrine of collateral attack is recognized as a defense against usurpation and abuse of power. The demurrer *ore tenus* is well defined and recognized. Irrelevant argument is sternly repressed. *Brown*: 161; cases. The functions of the mandatory and of the statutory records are well and clearly defined. The foundation of a judgment must appear from the former (the judgment-roll record).

From its decisions Wisconsin is entitled to first consideration as a code state. Many recent decisions must be found of the greatest possible value. *See*

Wisconsin.—

Kollock; *Verba fortius*, etc.: cases. *Boni judicis*, etc.: CONSTITUTIONAL LAW. § 30, *Hughes' Proc.*

WISCONSIN FARM LAND CO. v. BULLARD (1893), 119 Wis. 320. *Defenses not pleaded are waived*. *Borkenhagen*: 81; *Cromwell*: 26; *Pratt v. Hawes* (1903), 118 Wis. 603, 613 (citing *Borkenhagen*: 81); *Sache*.

Equitable estoppel must be pleaded, if relied upon as a defense. It cannot be established from evidence where it might have been pleaded. *Wright*: 28; cases.

Frustra probatur quod probatum non relevat. *Paulsen v. S.* (1903), 118 Wis. 89; *Harrigan, sub MAGNA*; *Fish v. Cleland*: 12c; *Perry v. Porter*: 136a; 195 U. S. 431, 432; cases.

WITHDRAWING A JUROR: A plaintiff may. *Bouv. Dic.*; *And. Steph.* Pl. 336; *Usborne*, 36 Ore. 328, 78 Am. St. 778-783, n.; 48 L. R. A. 432-441, ext. n. Codes were intended to abolish absurdities, and this practice is absurd. A court should relieve directly and not with circuitry.

WITHINGTON v. EVELTIE (1826), 7 Pick. 106. Tribunals must act at time and place provided for. *Blair*: 170; *Westfall*: 1 *Freem. Judg.* 121.

WITNESSES: Of witnesses and the means of procuring their attendance. 1 Gr. Ev. 306-325. *See SUBPOENAS*; *Subpoenas duces tecum*; *DEPOSITIONS*; 1 Gr. Ev. 320-326.

Attendance from compulsion without compensation. *Dixon v. P.* (1897), 168 Ill. 179, 39 L. R. A. 116-148, ext. n. *Tender of witness fees*. 1 Gr. Ev. 311.

Exempt from arrest while attending court. *Dunlap*: 168.

Religious belief; *necessity for*. *Omicund. Crimination of self*. *Nemo tenetur*. Separation of witnesses. *See id.*

Children as witnesses. *Uthermohlen*, 50 W. Va. 457, 88 Am. St. 884, n.; *R. v. Hill. Husband and wife*. *S. v. West*.

Power of court to call and examine witnesses. *South Covington R. R.*, 23 Ky. L. Rep. 1807, 57 L. R. A. 875-885, ext. n.

Prosecuting attorney; *competency*. *S. v. Tabor* (1901), 63 Kan. 542, 55 L. R. A. 251. Testimony of dead, absent and subsequently disqualified. *See TESTIMONY*, etc. 1 Gr. Ev. 163-168. *Generally*: 2 *Bouv.* 1239-1245; *And. Dic.*

WONDERLY v. LAFAYETTE: L. C. 102.

WOOD v. GRAVES (1887), 144 Mass. 365, 59 Am. Rep. 95; cases. Abuse of power makes officer a trespasser *ab initio*. *Six Carpenters*: 165; *Carrol*, 107 Mo. 573, 28 Am. St. 440.

WOOD v. LEADBITTER: FRAUDS.

WOOD v. WATKINSON (1846), 17 Conn. 500, 44 Am. Dec. 562-570.

Service of process; *service on partners*. Service on one for all, where and in what limitations valid. *Smith*, 71 Mich. 475, 1 L. R. A. 311, n.; *North*, 13 Ia. 496, 81 Am. Dec. 441; *Brooks*, 51 Fed. 138; cases; *Freem. Judg.* 219, 575, *Van Fleet*, *Coll. Att.* 420, *Ror. Int. Law*, 36.

WOODS v. FREEMAN (1863), 1 Wall. (U. S.) 398. *See Tilton*: 133.

WOODWARD v. MILLER (1904), 119 Ga. 618, 46 S. E. 847, 100 Am. St. 188-203, ext. n. The right to recover for negligence when there is no privity. *Thomas v. Winchester*; *Scott v. Shepherd*; *Cook v. R. R.*, 98 Wis. 624. *See Salisbury*; *NEGLIGENCE*; *TORTS*; *In jure*. *Cited*, §§ 13, 334, 342, 343, *Hughes' Proc.*; §§ 67, 296, 304, *Gr. & Rud.*

WOOLLAM v. HEARN: L. C. 53.

WORDS: How construed. § 151, Gr. & Rud. *Mallan v. May*; *Dewey v. U. S.* (1900), 178 U. S. 510, 521. *Verba, etc.* As a juridical element. § 313, Gr. & Rud.

Are limited by the intention. See *Church v. U. S.*; *S. v. Sheppard* (Mo.); *Osgood v. R. R.* §§ 268-275, *Hughes' Proc.*; § 313, Gr. & Rud.

Not sufficient to constitute an assault. *Stephens v. Myers*; *McClain, C. L., q. v.*

WORK v. S.: L. C. 242.

WORRELL v. MUNN: L. C. 390.

WRIGHT v. BOSTON R. R. (1880), 129 Mass. 440. S. P., *Rushton*: 5.

WRIGHT v. GRIFFET (1893), 146 Ill. 392-398.

Statutory record is exclusive for its uses and purposes. What should appear in it cannot rightfully appear in the mandatory record. *Clem: 2c*: cases; *S. v. Hawkins* (1882), 81 Ind. 486; *Planing Mill Co. v. 2d*. See ILLINOIS; MISSOURI.

Statutory record upon notice may be amended. The order granted therefor must be properly complied with. It must be aptly, correctly and technically done. It is the judge, his sanction, signature and seal that make the statutory record, and not what the clerk copies into the record or his transcript. "What ought to be of record must be proved by record and by the right record."

WRIGHT v. GRIFFET: L. C. 28.

WRIGHT v. P. (1824), *Breeze* (Ill.), 102. Sets out and follows *R. v. Wheatley*. See *Taylor v. Sprinkle*. § 23, *Hughes' Proc.*

WRIGHT v. TATHAM (evidence): L. C. 201.

WRIT: Of error; nature and purpose of. *McIntyre v. Sholtz* (1891), 139 Ill. 171; *Hayne on Appeal*, 301; 2 *Fos. Fed. Prac.* 1332.

Writs processes, etc. *Alderson, Judicial Writs and Processes*; *And. Dic.*

Writ of assistance. *Stanley*, 71 Wis. 585, 5 Am. St. 425; *Exum*, 115 N. C. 242, 44 Am. St. 449, n.; *Herm. Ex.* 350, 354, 2 *Encyc. Pl. & Pr.* 975-986, 93 Am. St. 159; 2 *Bouv. Dic.*; 198 U. S. 188.

Writ of possession. Jurisdiction of equity to put party in possession in aid of its decree. *Clay*, 199 Ill. 370, 93 Am. St. 146-165, ext. n.; *Hahl*. See EJECTMENT.

WRITING: What is a sufficient. *Brown*. See 2 *Bouv.* 1250; *And. Dic.* § 227, *Hughes' Proc.*

YARMOUTH v. FRANCE (1887), L. R. 19 Q. B. Div. 647, 17 Rul. Cas. 217, *Mews' E. C. L., Busw. Pers. Inj.* 211; *Labatt, Mas. & Serv.*

Employer's Liability Act. See *id.* A statute cannot authorize one to recover upon his own wrong. *Volenti non fit injuria*; *Nullus commodum*; *U. P. R. R. v. Capper*. See *Baddeley*, 19 Q. B. Div. 423-428, 17 Rul. Cas. 212, n.; *Roberts, sub M'Manus, Employer's Act.* *Busw. Pers. Inj.* 227-234. *Labatt, Mas. & Serv.*; *Huffc. Ag., Reinh., Tiff.* Statutory provisions for protection of laborers. *Consolidated Coal*, 51 Ohio, 542, 25 L. R. A. 848-856, ext. n.; 41 L. R. A. 33-153, ext. n.

A strict rule is applied against a servant's recovery in *Potts*, 9 Ir. C. L. R. 200, 7 Am. Law Reg. 555, *Wood, Mas. & Serv.* 326, n. 2; *Shear, Neg.*, 1 Add. Torts, 255, 564. See *Priestly*; *Mellors*; *Dresser, Employer's Liability Act.*

YATES v. JACK (1866), L. R. 1 Ch. 295, 3 Rul. Cas. 36, n., *Mews' E. C. L., Moak, Torts*, 435, 3 *Kent*, 448.

Easement of light. *Keating*, 146 Ill. 481,

Yates v. Jack.—

37 Am. St. 175, n. *Ancient windows*. *Henry*, 80 Ky. 391, 44 Am. Rep. 484, 21 Am. Law Reg. 394-409, ext. n. *Injuries to*. *Blish. Torts*, 923-925; *Moak*, 435-448; cases. See *Sic utere tuo*. *Air*. *Aldred's Case* (1610), 9 Co. Rep. 57b, 2 Rul. Cas. 559; *Bass v. Gregory* (1890), 25 Q. B. Div. 481, 2 Rul. Cas. 562, n., 558-574; *Case v. Minot* (1893), 158 Mass. 577, 22 L. R. A. 536-548, ext. n. (light, air and prospect in United States).

Malicious interference with light; legislative regulation of. *Rideout, sub MALICIOUS ACTS*; *Flaherty*, 81 Mich. 52, 21 Am. St. 510, 8 L. R. A. 183, n. (reviewing *Mahan*); *Kuzniak*, 107 Mich. 444, 61 Am. St. 344, n.; *Letts*, 54 Ohio, 73, 40 L. R. A. 177-185, ext. n.

YATES v. LAWING (1811), 9 Johns. 395, 6 Am. Dec. 290. Superior judges have absolute immunity for malicious acts causing injury. *Lange*: 159.

YATES, IN RE (1809), 4 Johns. 315-376. *Inherent powers of courts to punish contempt.* *Hale v. S.*; *Robinson, In re*; *Bailey, Jurisdic.* 287-309b. See *CONTEMPTS*. To vacate judgments. *Furman v. Furman*: 262. Power to hear and decide gives requisite incidental powers. *Hale v. S., supra*.

Notary public cannot punish for. *Huron, In re* (1897), 58 Kan. 152, 62 Am. St. 614.

YEAR: 2 *Bouv.* 1251; *And. Dic.*

YOUNG v. GROTE (1827), 4 Bing. 253 (13 E. C. L. R.), 12 Moore, 484; *stated*, 9 Rul. Cas. 337-349, 29 R. R. 552, 2 Add. Conts. 828, 13 Am. St. 374, 70 Md. 455, 49 Ark. 42, 4 Am. St. 20, *Jones, Construc.* 302, 69 Miss. 864, 23 L. R. A. 599-601, *Mews' E. C. L.*; *cited*, notes to *Kingston's Case*, *Sma L. C.* 813, *Rand. Com. Paper*, 1 *Danl.* 2; *Pars N.*, 1 Add. Torts, 33, *Bro. Max.* 809, 2 *Chit. Conts.* 932, *Bigl. Fraud*, 103, 2 *Wh. Ev.* 925, 2 *Gr.* 122, 3 *Kent*, 82; *Ewart, Estop. q. v.*

Cited, §§ 147, 148, 184, 203, *Hughes' Proc.*; § 290, Gr. & Rud.

Young stated: Y. gave his wife signed checks, but in blank as to dates and amounts. She undertook to fill one, and did it so negligently that "£50" was raised fraudulently by a holder to "£350," and transferred to an innocent purchaser, G., who sued upon it. *Held*, he could recover.

Breckenridge, 84 Me. 349, 30 Am. St. 353, n. (blanks left may be filled); *Angle*; *Burrows*, 70 Md. 451, 14 Am. St. 371; *Fordyce*, 49 Ark. 40, 4 Am. St. 18; *Baxendale*, L. R. 3 Q. B. Div. 525; *stated*, *Jones, Construc.*; *Greenfield Sav. Bank*, 123 Mass. 196, 25 Am. Rep. 67; *stated*, *Jones, Construc.* (this negligence was not the proximate or effective cause of the fraud; a crime was necessary for its completion); *Holmes*, 22 Mich. 427; 123 Mass. 208. See *Swan, sub Nullus commodum, etc.*

Equitable estoppel. When one of two equally innocent persons must suffer from the wrong of a third, he who first trusted must first suffer. *Lickbarrow*: 394; *Swift*.

YOUNG v. McLEMORE (1842), 3 Ala. 295.

A statute cannot authorize final judgment against a respondent for failing to answer interrogations annexed to the complaint. A jury must assess the damages if they are more than nominal. *Concor-*

Young v. McLeMore.—

dare leges legibus est optimus interpretandi modus.

A statute requiring a respondent to verify pleadings is satisfied by a stranger doing so, and of course the attorney of the respondent. See Warman. Statutes are construed to accord with reason, and with convenience. § 53, Gr. & Rud.

YOUNG v. BAINCOCK (1849), 7 C. B. 310, 337, 7 M. G. & S. (62 E. C. L. R.), Mews' E. C. L.: stated, note to Kingston's Case, 2 Smith, L. C., 8th ed., Dev. Deeds. Cited, § 174, Gr. & Rud.

Young stated: Estoppel by deed. When it can be collected from a deed that the parties to it have agreed upon a certain admitted state of facts, as the base upon which they contract, the statement of those facts, though only by way of recital, will estop the parties to prove the contrary.

Christmas v. Oliver; McKenzie, 184 Mass. 452, 100 Am. St. 566; Story v. El. R. R. See *Communis error facit ius*; DEED; 2 Gr. Ev. 293-300; 14 Rul. Cas. 577-833.

Pleading of estoppels. All estoppels must be pleaded. Young; Borkenhagen: 81; J'Anson: 91; *Res adjudicata*. They constitute new matter and as such must be pleaded. McKyring: cases; Wright: 28.

YUMDT v. F. (1872), 65 Ill. 372. Plea in the mandatory record essential. Monday: 79: cases; Crain v. U. S.

ZALESKI v. CLARK: L. C. 306.

ZELLERS v. WHITE (1904), 203 Ill. 518, 70 N. E. 669, 100 Am. St. 243. Cited, § 44, Hughes' Proc.

Variance; motion to dismiss for, must specifically point out the ground therefor. See VARIANCE; 98 Me. 401, 99 Am. St. (parties). From bill of particulars, not fatal. Zellers. §§ 272, 278, Gr. & Rud.

ZOUCH v. PARSONS (d'ABBOTT v. F.) (1765), 3 Burr. (Eng.) 1794, 1 W. Black, 575, Ewell, Lead. Cas. 3, ext. n., Mews' E. C. L. *Zouch* is approved and widely cited in America. Its rule is involved in *Craig*, 18 Am. St. 569-724, reviewing all cases and stating *Tucker v. Moreland*; Mews' E. C. L.: cited, 1 Wash. R. P. 456, 487, 3 *id.* 248, 249, 1 Dev. Deeds, 86 Sto. Ag. 6, 1 Rand. Com.

Zouch v. Parsons.—

Paper, 267, 1 Pars. Conts. 319, 1 Chit. 194, 201, 215, Laws. 134, 137; Beach; 94 Tex. 435; Whart. 46, 48, 1 Add. 155, 1 Sto. Eq. 240, 241, 1 Per. Trusts. 33, 2 Kent, 234-237. See works on commercial paper and equity. Cited, § 60, Hughes, Conts.; § 305, Gr. & Rud.

Infants; deeds of; when void and when voidable. Z. v. P.; Dolph, 156 Pa. 91, 36 Am. St. 25, n. (Infant may disaffirm his deed); *Tucker*; *Vasse*. See INFANTS.

Deed held void and incapable of ratification. Trueblood, 8 Ind. 195, 65 Am. Dec. 756-758, n., Ewell, L. C. Int. Id. & Cov. 36, n., Mech. Ag. 29, 50-53, Bish. Conts. 930; *Craig*. *Contra*: *Zouch*; Goodnow, 31 Minn. 468, 23 Am. Law Reg. (N. S.) 229, 234, n.; cases, 47 Am. Rep. 798-801.

Simple contracts of infants are voidable merely; the dissensus relates to his deeds, to his conveyances of real estate. On principle, all his contracts should be viewed alike. It is a remnant of feudal law that attached more importance to real estate transfers than to those of personality. See Shelley's Case.

However, there are reasons why technical rules of estoppel by deed should not be rigorously applied to an infant. Out of this consideration, the consequences of a rule of procedure—a rule of evidence—the specialty contract of the infant is influenced. Here is a final illustration of how adjective law affects substantive; how rules of pleading and of evidence react on contracts. These interactions should be perceived and understood. Texas R. R. v. Humble. See §§ 83-123, Gr. & Rud.

Deeds—specialties—formal contracts— are very technical. They often bind estate, heirs and privies. Estoppel by deed is technical and recondite.

These rules are not harshly applied to mental deficiencies. The law is deduced from necessity of protection, the charities of religion, the dictates of reason, the philosophy of nature and the experience of life.

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TESTIMONIALS OF HUGHES' DATUM POSTS OF JURISPRUDENCE

(VOLUME III, GROUNDS AND RUDIMENTS OF LAW)

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"There is the moral of all human tales,

'Tis but the same rehearsal of the past,

First freedom and then glory—when that falls,

Wealth, vice, corruption—barbarism at last.

And history with all her volumes vast hath but one page."

The best means of avoiding the dangers thus pointed out is in the establishment of justice through a uniform system of jurisprudence so well administered that all will commend the administrators. We are standing today amidst wealth, vice, corruption, and the way out must be by a reformed system of procedure for the whole country, interpreted by the very best legal talent the land can afford.

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THE DATUM POSTS OF JURISPRUDENCE

By WILLIAM T. HUGHES

Author of "CONTRACTS" and of "PROCEDURE"

"Man's greatest interest on earth is justice, sir," involves jurisprudence, which has for allies philosophy, theology and history. These are the uplifting factors of humanity; these factors pervade the life force of every good government, prescribing and regulating its conduct for the good of the whole. It is jurisprudence that molds and directs great moral agencies for progress, education and protection. The basic principles of that force should be as familiar to jurists as is the decalogue to the theologian. Whether they are or not may be tested by asking lawyers and comparing their answers. From these answers it may be determined whether or not there is a distinctive niche for a small work that will present these principles so they can be turned to on every hurried and pressing occasion for awakening thought, attending suggestion and for safeguarding and lighting the way. It will be more than a key; it will be a guide.

This work is offered as the greatest condensation of basic principles; to name, to make them most tangible as a needed exposition of the chief causes that have unsettled the law in various states; also of the adoption of views therein inimical to fixed and protecting government. In this connection several states are expressly mentioned. Also why it is that cases like *Pennoy*, *Windsor* and *Haddock*, reaffirming the fundamental maxims of antiquity, make so much commotion if not astonishment among the American Bar.

It is explained that jurisprudence has its DATUM POSTS and that from and around these the law has been developed. These dominant initials are gathered and impressed with copious yet concise illustrations. The Mount Everest of jurisprudence are pointed to and impressed as first precepts, constituting grounds and rudiments of law. In other words the law is shown to have its "beacon lights" and "landmark cases," as well as history and other presentments. From these the "useless grists of profuse jargon" can be readily discerned, also the departures from fundamentals by prominent errorists and misguided courts.

For the ends in view the content matter of DATUM POSTS is gathered from on high and is aligned on down. It is written from Alpine mountains, not from molehills; from fountains, not from rivulets. The principles of the unwritten constitution from the Roman, Norman, English and Federal are in one unbroken line. These principles are the maxims and their illustrative cases; e. g., *Audi alteram partem* is illustrated in *Windsor v. McVeigh* (U. S.); it is a part of DUE PROCESS OF LAW from the Roman, the Norman and the English (from Magna Charta) reexpressed in *Murray v. Hoboken Co.* (U. S.). These matters and their parts are variously expressed in the many provinces and on adown the numberless rivulets; they are set and made conspicuous in DATUM POSTS as DATUM POSTS in order to impress them. From these as set and explicated are seen the prolific discussions arising and issuing therefrom and in some quarters the hazy claims that "due process of law" can not be defined; also that each state may establish a local species of "due process of law" for itself, excluding fundamental principles of the unwritten constitution indispensable in a constitutionalism. It is not conceded that there is new or distinctively American law.

Those who believe that the simplicity, the morality, the intensive usefulness and the history of the law is yet to be written will be much interested from a review of the acorns, roots and heart-wood. Therefrom will appear the grounds and rudiments of law, its reason, necessity, convenience, public policy, and the mandatory requirements of defined government.

The following quotation may meet the acceptance of those who believe that

"Our birth is but a sleep and a forgetting;
The soul that riseth in us, our life's star,
Hath elsewhere had its setting,
And cometh from afar."

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The contents of the progressive, philosophical and bibliographical works such as Broom's Maxims, Smith's and White and Tudor's Leading Cases, Story's Pleading, Greenleaf's Evidence, Bishop's Criminal Law and Mechem's Agency are most easily found from this work, which is bone of their bone and flesh of their flesh, a fact which is made to appear; it does not conceal its parentage; nor does it pad therefrom. The great works are faithfully cited. This work epitomizes and condenses beyond all others. The matter of the great works was not alone in view, but the heart and vitals of the six leading subjects of the law were also wrung and picked out and are reflected as from a miniature composite as is next observed.

It reflects more than 100 rules from each of these subjects; namely, Procedure, Equity, Contract, Crime, Tort and Construction, which have all given up their leading rules for the soul of the newcomer. It is the ablest epitome of procedure, contract and construction, of maxims and leading cases.

It presents more than 1,000 important principles and rules adjusted both to the old and to the new. It is a spiritual rehabilitation from the fountains; it is a reincarnation from antiquity.

The conserving principles of procedure are enumerated and defined consistently with that law which was given by antiquity to posterity, and which is the greatest asset of every protecting government. These principles are expressly named and are constituted a nucleus from and around which hundreds of rules of evidence, pleading and practice are arranged, and from which all branches are correlated. The chief rule of evidence, namely, "What ought to be of record must be proved by record and by the right record," is constantly impressed. The mandatory record is defined and explained. This is presented as a constitutional implication.

Contract is well introduced in cases numbered 301-417. Under each case are gathered the various authors on contract who have cited the leading cases (thus results a key to the library). Sixty pages do for contract what no other work thereon has done. It is a valuable complement to every work on contract. The elements of crime are likewise condensed. It surpasses any work on construction. The principles of the unwritten constitution are shown to be the "metwand" of the meaning of words in American organic law. Along this line of thought much that relates to constitutional law is introduced. Its principles are interwoven.

To its pages it is the best maxim and leading case work. These are selected to illustrate the unwritten constitution. With these ends secured it was next in order to gather and arrange the matter of the great works, also the dry anatomy of the leading subjects of the law.

This work is a nonpareil in more respects than in type alone. For it is a nonesuch for the beginner, a peerless for the student, a matchless for the practitioner, a boon for the professor and an incomparable for the jurist. It is like a well from which all can draw according to his reach. The novice will see more of the fundamental principles and the leading and annotated cases than mere prefatory claims relating thereto. Every time he opens this work he will see those desiderata marked by designating type and in conspicuous alignment and therein followed by their bibliography. There is nothing left for him to dwell upon, or study over, or inquire after in order to know what are the fundamentals, and the leading cases illustrating them. The index alone will teach him. It will point to the maxim and the case upon the subject he is considering directly with ease, certainty and facility. Grouped around the DATUM POST so pointed out, will be found the bibliography of the question (thus will appear the key and the guide).

As the improved firearm advanced the soldier, so the improved law book will advance the lawyer.

PAGES, 263. OCTAVO. PRICE, \$3.50 NET.

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FOUNDATIONS AND RUDIMENTS OF LAW

From the Chicago Legal News

Volume I.—This is a book of 356 pages, but used in connection with the author's *DATUM POSTS* impresses us as being the *best hand-book or legal bible for the thoughtful and representative lawyer we have seen*. It is not a book which can be reviewed or appreciated from a cursory examination. It is full of meat from cover to cover, and apparently there is not a page from the preface to the index which will not stop and hold the studious lawyer and arouse within him a desire to hold the book at hand for study and studious examination.

The author in his preface says: "All lawyers should understand the fundamentals of the law and how to find, discuss and teach them. The lawyer who understands the fundamentals of the law understands it very differently from him who does not," and it is safe to say that any lawyer, however wide his experience or broad his learning, may read and study this book day after day, week after week, in connection with *DATUM POSTS*, to the best possible advantage.

At a casual glance it seems abbreviated to a startling degree, but upon reading one finds the statements, while terse, yet so clear, bringing out the principles in such bold relief and plain outline, that in connection with the references to the leading cases cited in *DATUM POSTS*, one feels that he is placed heart to heart with the very core of the legal situation under consideration.

The author says he calls attention to chapters 1, 3 and 10 as being very instructive for students. Our own impression of these chapters is that they are instructive and wonderfully valuable to the experienced practicing lawyer who desires to attain a ready, accurate and effective mental equipment in his profession.

The student who will read and digest the contents of this book will find himself possessed of a foundation of the broadest character and a knowledge of basic principles which, applied to the various phases of legal situations arising, will mark him an unusual man among his fellows.

With wonderful brevity and clearness, the author has presented a vivid idea of the history of the fountains of the law, the fundamental principles, maxims, the rules of pleading and illustrations of principles as exemplified in the leading cases in legal history.

Volume II.—The author here presents a continuation of his projected series; this volume, taking up the subject and beginning with page 357, continues in the same line to page 584, at which point we are informed Volume III will take up the thread, being practically *DATUM POSTS OF JURISPRUDENCE*, re-foliated to constitute Volume III of the series, while Volume IV yet to come will complete the work.

Volume II before us consists principally of a text-index and constitutes an *intensely condensed presentation of legal subjects, maxims and references*, fully in accord with the author's system in his first volume and in his *DATUM POSTS*.

The work throughout shows a remarkable faculty for condensation, *combined with the broadest and most comprehensive scope of legal subjects covered*, and sustains the keen interest aroused in the legal student by Volume I.

From the Central Law Journal

Volume I.—We regard this as the most finished of Mr. Hughes' several productions. It is so wrought out as to be easily grasped by the reader. The brief history with which this work is introduced is comprehensive and intensely interesting, and presents the greatest defense of those matters wherein Lord Bacon has been criticised by his great contemporary and rival, Sir Edward Coke, and others, which we have ever read. In all its hideousness he brings out the despicable conduct of Coke, in forcing his fourteen-year-old daughter to marry old John Villiers, in order that he might secure the influence necessary to his attainment of the political power he was seeking. He shows this conduct of Coke in contrast with Bacon's having taken presents from suitors who had cases in which Bacon was to sit as judge, in such a striking manner as to make Bacon's conduct pale into insignificance, in view of Coke's more than inhuman conduct toward his own young daughter, whom he sold in order that his abandoned selfishness might not fail of its objects. Bacon is Mr. Hughes' idol, and he declares his faith in him in no uncertain terms. This faith, however, is not such that it can be said that its realm cannot be entered with reason, for he accompanies it with such powerful incident and cogent argument, that one is brought into full sympathy with it all and moved to worship at the same shrine. He demonstrates beyond cavil that, as a lawyer, Bacon is pre-eminently greater than Coke. To Bacon belongs the honor of bringing a code of equity into the body of our jurisprudence gathered from the genius of the Roman, which is, in truth, its crowning glory. Coke, in order to establish his system of jurisprudence, succeeded, through his bought political influence, in relegating equity to a secondary place for hundreds of years, aided by his disciple, Blackstone. The spirit of the common law became dominant and in spite of the effort of David Dudley Field, in the United States, to establish the Baconian system of jurisprudence by his code, the common law spirit has been so powerful that this code has lost largely of its significance through interpretations of it rendered by judges and lawyers imbued with this same common law spirit breathed into our jurisprudence by a man who, while yet remarkable for his legal ability, was one of the most despicable characters among great men. Mr. Hughes shows Coke's accepted maxims to have been derived from the civil law of Rome but given with the idea that they were of English origin.

Mr. Hughes shows Sir Francis Bacon so great in his philosophy of the law which England has at length accepted in spirit and truth and which was presented to us by Mr. Field even before England had come to recognize by any proceeding, that same philosophy, that we wonder that it could be possible that we have been so blind as not to have seen so glorious a light as that which Bacon set in our juridical heavens. It is shining more and more and will lighten up a more perfect day which we see dawning. That day will discover equity the dominating spirit of our jurisprudence and to aid in bringing this about Mr. Hughes has produced a wonderful work in this volume he calls *FOUNDATIONS AND RUDIMENTS OF LAW*. It contains the elements sufficient upon which to base a religion, a

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philosophy, or a nation's jurisprudence. Generally speaking, the whole land needs to be imbued with it to the end that we may have one simple form of procedure which will not only be worth while in each of our forty-six states, but everywhere the civil law as the basis of government, for in it is the genius of a wonderful people, who knew how to gather the accumulated wisdom of the preceding ages into the greatest system of jurisprudence the world has ever known, and whose precepts must live forever, lighting up ages yet to be, as they grow into a perfect day. He ranks St. Paul as one of the greatest jurists of the ages.

He shows Bacon, wonderful as he is as a philosopher, to have achieved his crowning glory as a philosopher in his philosophy of the law. From this viewpoint he ranks Bacon, next to Christ, as a human benefactor. Upon this proposition he will find many who will differ with him who nevertheless will agree with him on other points. This comparison was unnecessary and does not strengthen his argument. It is enough that Bacon's own prophecy is being fulfilled that time and a foreign land would recognize him as a greater lawyer than Sir Edward Coke.

No one who has given much time and thought to Bacon's system of jurisprudence with a comprehensive grasp of the importance of his equitable principles gathered from the civil law which grew out of the accumulated wisdom of all the preceding ages, can but say that Mr. Hughes has a vast amount to justify his idolatry. *The basic principles of justice are eternal*; the errors of Coke and Blackstone are turning to ashes, out of which Mr. Hughes beholds his idol rising "Phoenixlike to Jove." Around are gathered Mansfield, Story, Kent, Marshall and David Dudley Field, and many others, joining in one sublime chorus glorifying his wonderful work. We find ourselves in sympathy with Mr. Hughes' really great production. Anyone who will read it, chew and digest it, and then practice it, will advance the science of government wherever he is, for it is indeed truly Baconian. *It furnishes the simplest rules to the attainment of justice by the simplest process.* We need it in our philosophy of government to replace the crumbling foundations which are menacing the common weal of many a state.

With all his idolatry he yet nevertheless does not fail to recognize the good in Coke's works, and marks the fearlessness with which Coke repressed direct bribery and his abhorrence of it.

He thus shows forth the remarkable inconsistencies of great minds, experienced in the use of the principles which make for justice.

The work is a great one for the beginner, as well as for the advanced jurist. Who should be without such a book?

Volume II.—The second volume of **FOUNDATIONS AND PRINCIPLES OF LAW**, by W. T. Hughes, has recently issued from the press. It is not necessary for us to tell our readers that we consider this the second volume of a great work, *coming in the fullness of time*—that is to say, *when the fundamental principles*, which stood as the steadfast bulwarks of the nations long before Paul, pleading his own cause before King Agrippa, claimed protection of the laws of Rome, *are being lost in the ocean of "last cases."*

Volume II may be viewed as the note matter of volume one, which is also indexed. *This second volume is a text of 1,500 topic heads, of maxims, cases and usual index topic heads*, all so set and arranged as to lead to the maxim or leading cases on the subject under consideration. Thus it is an index to the Roman, the English, the Federal and the best matter of the states; it is an index to great matter from A to "Leading Cases"; the latter constitutes Volume III; from these to Z will comprise Volume IV, soon to appear. *It indexes the old and the state law.* It is copious with federal citations. Massachusetts, New York, Pennsylvania, Illinois, Wisconsin and Missouri are fully represented; the latest cases from those states are found. *Harrow v. Grogan*, 219 Ill., is given three pages. The 118 American State Reports are represented, also the latest in the L. R. A. and the C. L. J. *It is a late case book, as well as a fundamental and maxim book.* Its articles on Appellate Procedure, *Audi alteram partem*, Bacon, Case System, Certainty, Codes, Collateral Attack, Construction, will arrest and hold the attention of the lawyer for days and even weeks. Among the maxims are forty-three that have from one to six page discussions. All readers will be not only interested but profoundly interested to read the explication of *Ignorantia legis neminem excusat*, *In jure non remota*, and *Frustra probatur quod probatum non relevat*, all adjusted to the Roman, English, Federal and the States. It is most cosmopolitan in its citation of the oldest and the latest, with a constant preference for the greatest most widely found cases and accessible. *It gives to the reader the benefit of his own library*, be it great or small; *it is a library in itself.*

Lawyers and judges are beginning to see the decay of our jurisprudence in following case law merely. *Who can understand whether a case is decided right on principle if he does not know the principles and their relationships*, and how is he to get them from cases which ignore them or are decided contrary to the fundamental law? When the reason for the law is lost or submerged, how are we to be guided in the course of procedure? No lawyer can afford to say, "Oh, I have not the time to give it." The truth being known, he cannot afford to lose time from a deep perusal of so practical a work, for it shows the way, the truth and the life of all jurisprudence.

From the Harvard Law Review

The **FOUNDATIONS AND PRINCIPLES OF LAW** and **DATUM POSTS OF JURISPRUDENCE** may be considered together, for the motto of both, *Melius petere fontes quam sectari rivulos* (it is better to seek the fountains than to wander down the rivulets), sets forth their joint purpose. The author, to use his own figure, has sought to write a geography of the law. The **FOUNDATIONS AND PRINCIPLES** describe the unknown land, the **DATUM POSTS** represent the illustrative maps. The fundamental principles of the law represent the continents, the maxims represent the countries, the great cases are the provinces, and the lesser cases the cities, towns and hamlets, according to their magnitude. The scheme of the **FOUNDATIONS AND PRINCIPLES** is indicated by some of its chapter headings: Fundamental Principles, Conserving Principles of Procedure, Code Procedure, Practice Acts, Collateral Attack. To

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support his necessarily brief and general statements, the author refers to his DATUM POSTS, which consists of the cases which he has selected as leading, arranged in alphabetical order, tersely stated and surrounded by groups of lesser cases depending upon them. The two books taken together might be described as a mercator's projection of the law upon a small scale.

Certainly this method of treating the law is novel. *To one who wishes to correlate the different branches of the law into a unit it will be of great assistance, whether he agrees with the author or not.* But how far it will help to solve the immediate problems of every day is more open to doubt. A map of the world increases one's general knowledge, but it is a poor guide from Boston to New York. In those circumstances an ordnance map of the immediate region (represented here by the more usual text book) is more to the purpose. Yet the author deserves the thanks of brother lawyers for striving to chart, even in general fashion, a land which each year becomes more thickly covered with a forest of conflicting decisions.

The GROUNDS AND RUDIMENTS OF LAW has already been adopted in the John Marshall Law School, Chicago, also the Chicago Law School. The latter school, for brevity, celerity and far-reaching instruction, has made the DATUM POSTS the basis of authority. It teaches the maxim and the leading case illustrating the maxim. To illustrate, from its place in the syllabus of the course of instruction on the Law of Agency, we quote at random:

MAXIM:

Idem agens et patiens esse non potest: To be at once the person acting and the person acted upon is impossible.

DATUM POSTS:

Leading Case, 176, 417.
Keech v. Sandford; Michoud v. Girod.

MAXIM:

Delegatus non potest delegare: A delegate cannot appoint another.

DATUM POSTS:

Leading Case, 177.

"Kindly allow me to express to you my gratitude for the work you are doing in making the law a more attractive and less burdensome study. It is impressing the unity and philosophy of jurisprudence in such a practical way as to inspire me with a new hope that practice will be checked in its career of an endurance test of who can pile up the most 'authorities' or is skillful enough to get the 'latest case' into his brief. I am particularly interested in your GROUNDS AND RUDIMENTS OF LAW, the illuminating discussions of Volume I, the highly condensed 'Text-Index' of Volume II and the manner in which you have digested the Leading Cases in your Volume III, or DATUM POSTS. The entire work has given me a stronger grasp of the fundamentals, and especially has it shown me the necessity of clinging to principles of procedure, which you so convincingly demonstrate are necessary to a constitutionalism and which are evidently growing to be looked upon more and more as mere rules of convenience. You have placed a strong shoulder to the wheel, and well deserve the highest commendation. *You have illumined the way of the lawyer, furnishing him with bright and trustworthy signals; you have lifted at least fifty per cent of the difficulties from the shoulders of the student; you have shown to the public a clearer light for the application of justice to their affairs by the stronger retention of fundamental principles, without which government must lose its force through lack of respect and 'chance govern all.'* * * *

JOHN H. SEARS, St. Louis, Mo.

"I have carefully examined the works of W. T. Hughes on CONTRACTS, PROCEDURE, DATUM POSTS, GROUNDS AND RUDIMENTS OF LAW, and have found that but little time is needed to understand the system upon which the books are built, and to get the key to unlock the store-houses of the law contained in them. I have used these books in my work, and now on any question of importance or difficulty turn to them in advance of the use of encyclopedias and text-books. *In fact I turn to them as soon as to the digests of my own state. I have found it very unsafe to rest in confidence on the modern decision, so that when I find a decision I test it by means of these books, to find out whether it is right in principle.* I recommend them to all lawyers and judges, old and young, and urge each to purchase a full set of the books. They furnish at almost instant command the leading cases and their foundation principles.

"In the general run of work it is impossible to spend the time and labor for examination of all the cases. For various well-known reasons the modern decisions stand in light esteem, and it is constantly necessary to hark back to the leading cases for guiding principles in testing the value of such decisions. Such decisions are often devoid of principle and are the result of a fatuous and servile following of a supposed precedent, unmindful of what is required to make a valid precedent. In the press of work the modern judge is too apt to stop his search on finding a statement of law in a former opinion, and citing such statement as settled law, without applying the requisite tests to see whether such statement is law and the expression of correct principles. He who thinks that a statement of law is sound because it has once been made at a former time is unmindful of the just limitations of the human intellect, and of the fact that most cases afford but side glances at principles of law.

"The great judges have always struggled against being bound by a former decision as

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authority, unless they could see that the principle of the decision commended itself to their judgment. *These books are needed to keep before the lawyer and the judge the leading cases, the mountain peaks of the law, so that they can constantly orient themselves and keep a due course amid the maze of modern decisions built on supposed precedents.* I marvel at the labor undertaken and accomplished by the author, and at his courage and endurance. By these books Mr. Hughes has erected a lasting monument to himself. I admire his plainness of speech in statement of principles and criticism of courts and decisions; it came at high time."

J. M. H. BURGESS, Chicago.

"I have Mr. Hughes' *FOUNDATIONS AND PRINCIPLES OF LAW AND DATUM POSTS*. They are fine. The author has rendered a distinctive service—to the student of law, in starting him right; to the bench and bar, in keeping them right, avoiding surplussage, delay and expense (crying evils in modern procedure); to the statesman, oftentimes ignorant of, or willfully disregarding the trinity nature of government, executive, legislative and judicial, by indicating those 'conserving principles' which should control each within its sphere; and to mankind generally, by emphasizing the way in which life, liberty and property are safeguarded by a prescriptive constitution.

"A lamentable fact must now and at last be admitted; and it is a fact that lies at the base of procedure and thus the due administration of the laws. This great fact is that the courts and the bar are so educated that they cannot distinguish between the *mandatory* and the *statutory* records and between waivable and non-waivable matter. It is from Mr. Hughes' works that these leading matters are taught. Such learning is distinctive and has long been needed. Had I had such a work twenty-five years ago it would have shaped a destiny for me different from the one which has come to my lot. But now and at last I take the greatest pleasure in receiving the instruction for which I have waited too long."

GLENWAY MAXON, Milwaukee, Wis.

"*THE FOUNDATIONS AND PRINCIPLES OF LAW* is a timely work. It is needed and should be read along with the writings of Judge George H. Smith of Los Angeles ('Theory of the State'). Hereby the student will be greatly profited. Mr. Hughes' work is of the greatest significance; it compasses the whole body of the law in the most condensed way. The treatment of the 'theory of the case' and of 'adjective' and 'substantive' law is needed instruction. The mystification around these subjects is at last cleared away. Beyond all it is demonstrated that life, liberty and property are safeguarded by a few maxims and their interacting rules upon the conserving principles of procedure; thus is demonstrated a prescriptive constitution. It is shown that procedure must be viewed from these conserving principles. The argument for this calls for new definitions and a new nomenclature, which have happily been given. In this alone great research and originality are shown. These features of the work make it very interesting, and make it a high and healthy breath. For this it is a class of its own."

HIRAM L. SIBLEY, Columbus, Ohio.

"*THE FOUNDATIONS AND PRINCIPLES OF LAW AND DATUM POSTS* are complementary works, and the value of one is greatly enhanced by the other. In *FOUNDATIONS AND PRINCIPLES*, the preface alone is the scintilla which leads the student on to the succeeding eleven chapters which reflect the illumination of the entire field of law. Here is the great value to the body of lawyers who are staggering under the weight of endless 'digests,' 'reports' and 'encyclopedias' and here alone is the solution for a book-ridden profession which already has one limb drawn deep into the quicksands of a million cases and more. The fountains of the law—maxims, principles and leading cases—what further equipment is needed? *The chapter X, 'Leading Subjects Epitomized,' is a library in itself, and well equipped is the lawyer if he but accept all that is held out to him here.*

"In these days when each jurisdiction seems to have its 'leading case,' it is somewhat clarifying to one's vision to turn back, as one can with the aid of *DATUM POSTS*, to the case which is regarded as the authority, no matter in what court or state or jurisdiction. The lawyer who is thoroughly grounded in the underlying principles of his case is not likely to be far misled by 'recent cases' upon that point. If courts were more prone to regard the '*datum post*'—the fundamental principle—instead of the 'late case,' we would not be treated to such a realistic view of jurisprudence 'shooting Niagara.'

"It is actually regarded in many courts as unnecessarily wasting their time to argue first principles instead of attempting to reconcile cases more or less in conflict in the jurisdiction. All that need be 'reconciled' is the given case at bar with the fundamental principles. Glimpses of modern law libraries might almost lead us to believe that even principles have changed. The 'modern law' of what not and the 'new code' of something else are all too frequent titles.

"It is the duty now, and sooner or later it will become a necessity, for the profession to turn its back upon what is a hopeless condition to the source whence comes the light. The remedy is not in chaos, but in the great principles from which is evolved the law. I trust that you may succeed in properly placing your valuable works before the lawyers and the judiciary, that this day may be hastened, and a grateful profession would readily acknowledge the credit that is due to you for what is really the only solution of the problem."

E. BENTLEY HAMILTON, Chicago.

"Mr. Hughes' works on jurisprudence, the *DATUM POSTS* as well as the work for students, are classics in the law and disclose more industry than is shown in many books which are reputed all over America. I have used these books in practice, clearly disclosing their usefulness in the actual practice of the law as well as for students; but particularly their classic and historical references become an education, and for this reason become more attractive to the court and jury, as they are shown to be drawn from investigation at the very fountain-head of the subject."

COL. JAMES HAMILTON LEWIS, Chicago.

THE GROUNDS AND RUDIMENTS OF LAW

By W. T. HUGHES

DEANS AND PROFESSORS: Why is jurisprudence an abracadaba among the states? Why is each a tribe, a law unto itself, with warring chiefs within? Why is so much claimed for native sons, their decisions and compilations for students, in the light of cold and gloomy facts? Where and by whom are the cardinal principles catalogued and made accessible and clear? Are not the orient peaks obscured and shrouded in a menacing cloud of haze and confusion which hangs over and darkens the way, deluging the plains below with a conglomeration of parrotings, of clamor and din, of paraphrases and pastings, if not manifest reprint and repetitions—the output of commercialism? Of such matter rows of books as long as clothes-lines are shown the beginner as necessities for his progress. Herefrom naught is seen but a foreboding and repulsive career of drudgery, of doubt, and too often disappointment.

See how the soldier, the sailor, the surgeon, the engineer and the scientist have advanced. But how is it with the lawyer?

When the philosophy of the law is lost the law is lost. Where are the cardinal principles? Learn the condition by going from school to school; look over most of the literature that is used, and note how little of this a lawyer values for any purpose or will have on his shelves. Who will claim that the fundamentals of the law can be found and picked out by any two lawyers alike from the literature in general use? And can any one, with ease and facility, turn to any truly great principle, and find it best stated in that literature, also in connection therewith the most widely found and cited cases in all English-speaking countries? For example, take *Verba fortius accipiuntur contra proferentem* (every presumption is against a pleader). Get at the facts and see why the graduate has a narrow vision; why his situation may be likened to one digging a well—the deeper he “digs,” the more limited his horizon; why it is that if he goes from one state to another he leaves his hard-learned local and provincial “late-case” matter behind. Should the main stream or the rivulets be explored? Should the water at the fountain be sipped, or the flow therefrom sought in the marshes below?

Who will deny that in some schools nothing is taught beyond nibbling at the buds—the “late case”; that the acorns, the roots and the heartwood are unknown; that the lawyer as a

botanist is not a thinker nor does he know all parts of the plant of which he makes a specialty?

There is reason for saying that the time has come when the condition should be realized and therefrom hard and pointed questions asked. Society needs lawyers; these must come from beginners, and these must be protected. The greatest of the professions should not be allowed to become the graft of cupidity, of selfishness, of stupidity, and of ignorance. Now, what do the facts show?

To arouse intellectual interest it seems well to call attention to the inadequacy of old definitions properly to impress, as is indicated by an editorial in the 67 Central Law Journal, 393-394. Herein is indicated an answer to a Chicago paper, which discloses a wide diversity of view as to the functions of pleadings;* here we have journals of great cities, studded with law schools, engaged in a duel which shows that some one is floundering in the marshy silt of judicial opinion as to the ends and purposes of essential records. Illinois and Missouri altogether have a thousand books, any one of which might well have a true definition of pleadings. But have they? Which is that book, and who can find it; will any two lawyers agree upon the precise import of the lines when found? See ILLINOIS, Vol. II, Grounds and Rudiments of Law; also *Dovaston*: 217,* Vol. III, *id.*; also MISSOURI, Vol. IV.

Each of these states has a statute of jeofails that is upheld and nullified in alternation. Relating to Practice Act provisions and codes is illimitable jargon. This statute was nullified in *C. & A. R. R. v. Clausen*, 173 Ill. 100. See also *McAndrews*, 222 Ill. 232 (same point as *Rushton v. Aspinall*: 5, Vol. III, Gr. & Rud.); *Stillo*, 140 Ill. Ap. 428; *Mallinckrodt*, 169 Mo. 388 (Vol. III, Gr. & Rud.); *Dovaston*: 217, Vol. III; also MISSOURI and VARIANCE, Vol. IV, *id.*

An illustration is afforded from plain, practical questions, *e. g.*: What facts and exemplifications are necessary to prove an estoppel of record or title to property, whether real or personal, that depends on an execution or a judicial sale? Is this a local or provincial question? Or of evidence, or pleading, or practice, or real estate, or personal property, or "adjective" or "substantive" law, or of constitutional law, or of government? Is the following rule of evidence involved, namely, "What ought to be of record must be proved by record and by the right record"? Is this a major or a minor rule of evidence? Does it inseparably involve pleading, and the record upon which a judgment or decree depends? Can a constitutionalism be operated without respect for this rule of evidence? Upon what record does the validity of a judgment or a decree depend? Is the study of procedure a study of government?

* See sample pages following.

Ask for the definitions of the two juridical records, the *mandatory* and the *statutory*; what are their respective origins, and their exclusive functions throughout the law? What have the statutes of jeofails to do with these records; do they affect both alike? What is the construction of these statutes in Illinois, Missouri, Indiana, Ohio and New York? Are these statutes congruously construed in any of these states? Look from *C. & A. R. R.*, *supra*, also from the Roman and the common law, and see if the statute is not a *reductio ad absurdum*. If it is, why should not the courts tersely say so and stop? When they are viewed as merely affirmative statutes, why should reports of supreme courts be made a bewilderment of discussions relating to the construction thereof? See ILLINOIS, Vol. II; MISSOURI, VARIANCE, Vol. IV.

After a consideration of the above, it seems well to ask if the American student is not handicapped by a haze called "American law" and dwarfed with a nostrum called "case system"; bewildered with the illusion relating to "adjective" and "substantive" law; swamped by that *ignis fatuus* that procedure is a local and provincial subject; and misled by the belief that equity is merely an accessory. Is it taught that from equity there spring principles to which not only statutes, but constitutions as well, yield? Is it not chanted and taught that written constitutional law is imperial; also that cardinal principles can be changed by statute? (See *C. & A. R. R.*, *supra*.)

Is not the student handicapped by the worse than careless teaching of narrow and misleading definitions of pleadings; by the unbelievable ignorance all over the land as to the distinctions between the *mandatory* and the *statutory* records? Are not the ways of an absolutism advanced by countenancing departures and variances? Also thereby emasculating the division of state power? Also by the euphemism called the "theory of the case," or waiving of essential pleadings or record matter, or other barriers of protection? Also by the ignorant, unmoored construction which has made of the code a mystery?

It is now plainly demonstrated that the wreck of the prescriptive constitution is not perceived nor understood; that a distortion of principles is parroted and taught instead of fundamental law; that students are not taught that the study of procedure is a study of government; that disturbances of government react upon procedure; that there can not be named a dozen fundamental principles in concise and teachable form, that can be found and defined in a score of the most widely-used student's books. To illustrate: Let us offer this as a cardinal rule of evidence, namely, "What ought to be of record must be proved by record and by the right record." Where can this be found and where is it taught; where is it expressed and explained? Where is it shown that the operations of a constitu-

tionalism depend upon this rule? See LITERATURE, PROCEDURE, VARIANCE, Vol. IV.

Matter, definitions gathered and correlations that will answer such questions are not for lawyers alone, but for beginners as well. The professor who will deny this defies the rule that the short way is the best way; he denies a ground and rudiment of law—convenience. It is indefensible to contend that making it easy to find *Hadley v. Baxendale** (Gr. & Rud., Vol. II), *Barron v. Baltimore* (L.C. 241, Gr. & Rud., Vol. III), *Coggs v. Bernard** (L.C. 350, *id.*), or *Swift v. Tyson**, or the *Squib Case** (Vol. IV) is just the thing for the lawyer, but otherwise for the student. For him the way of the law should be made most inviting and cheering, not a graveyard for noble impulses and high ambitions which are charmed and greatly advanced by the “gladsome light of jurisprudence.” This is for the thinker and not for a drudge in the treadmill, and such as the lawyer has become.

Permit us to ask if a forward step cannot be taken by comprehending the advantage of getting the maxim or the leading case and working from it. To illustrate: Suppose the elements of contract are desired, and for the ends sought we turn to the title CONTRACT in the index of Vols. I or III, and thereunder find indices that suggest the maxims and the leading cases, as the following extract will show:

CONTRACT: Defined, § 280 (Vol. I). General observations; leading rules; Maxims; Cases; resume. §§ 280-290 (Vol. I). See CONTRACT (Vol. II); Leading Cases 301-417 (Vol. III). Elements. Leading Cases 301*-417 (Vol. III). The offer, request, assent, acceptance. L.C. 301-333 (Vol. III). The consideration. *Ex nudo pacto non oritur actio* (Vol. II); L.C. 301-333 (Vol. III). See CONSIDERATION* (Vol. II). Assent. See *Non hæc in fœdera veni* (Vol. IV). The request. Lampleigh: 301* (Vol. III); § 281 (Vol. I). Assent a leading element. § 280 (Vol. I). Mutuality; both sides must be bound or neither. *Cooke v. Oxley*: 321 (Vol. III); § 281 (Vol. I). Legality essential. See *In pari* (Vol. II); L.C. 358-373 (Vol. III). Certainty essential. L.C. 305-307, 335-341, 364 (Vol. III). By letter. Adams: 326 (Vol. III). Classification. Rann: 312 (Vol. III).

(Among the cases (Vol. III) numbered 301-417, all of the leading cases of Contract are gathered, stated and explained.)

Further to illustrate: Look at FIXTURES* in its alphabetical place in Vol. II. Therefrom one is led to *Elwes v. Mawe**, the widely known and cited case; also to the maxim, *Quicquid plantatur solo, solo cedit*. From the topic, the case and the maxim thus found will appear what is afforded for a start in the way of *finding the law*.

Upon this plan thousands of matters may be traced, starting from either the *topic*, the *case* or the *maxim*.

* See sample pages following.

E. S. A.

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